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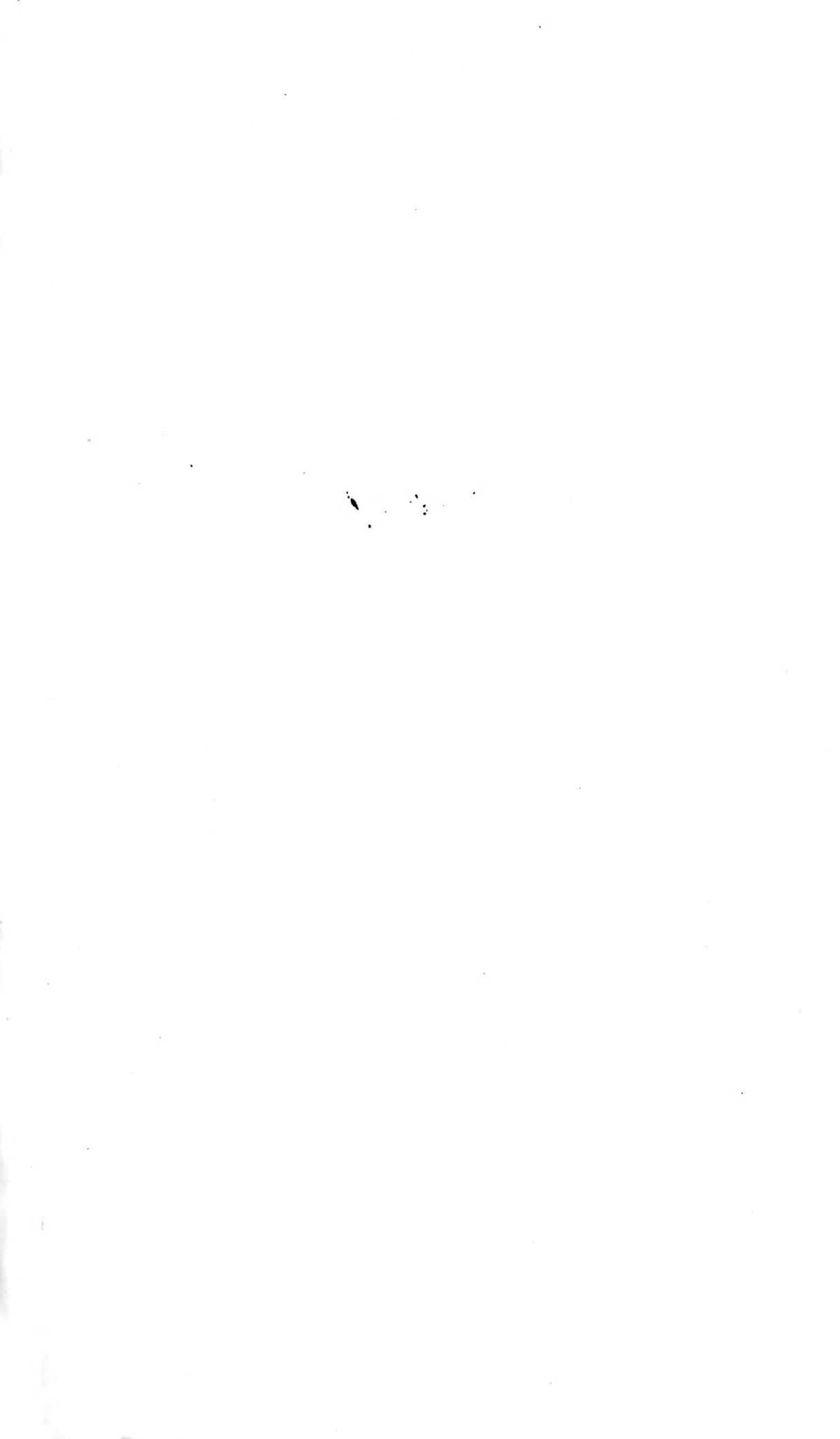
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EXTRACT FROM BY-LAWS

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No. 4027

1349

United States

1349

Circuit Court of Appeals

For the Ninth Circuit.

HOWARD AUTOMOBILE COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Apellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

No. 4027

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

P. R. LUND, Esq., Attorney for Appellant, San Francisco, California.

UNITED STATES ATTORNEY, Attorney for Appellee, San Francisco, Calif.

In the United States District Court for the Northern District of California.

No. 12,996.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make up the record on appeal in the above-entitled cause including therein the following documents on file in your office:

1. Affidavit and petition of Howard Automobile Company for return of Buick Roadster together with Exhibit "A" attached thereto.

2. The answer of the United States of America to said petition together with any exhibits which may be thereto attached.

3. The order of court made and entered April 14th, 1923, denying the application of said Howard Automobile Company.

4. The petition for appeal.
5. Specification of errors.
6. Order allowing appeal.
7. Undertaking on appeal.
8. Supersedeas order.
9. Citation on appeal.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed at 10 o'clock and 15 Min.
A. M. Apr. 26, 1923. Walter B. Maling, Clerk.
By C. M. Taylor, Deputy Clerk. [1*]

In the United States District Court for the North-
ern District of California, Division One.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. O. KILDALL,
Defendant.

**Affidavit of Chas. T. Dodge and Petition of Howard
Automobile Company (for Return of Autom-
obile).**

State of California,
City and County of San Francisco,—ss.

Chas. T. Dodge, being first duly sworn, deposes
and says:

That at all of the times herein mentioned Howard
Automobile Company was and now is engaged in

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

the manufacture and sale of automobiles in the City and County of San Francisco and at all of said times this affiant was and now is the Assistant Cashier of the said Howard Automobile Company and as such assistant cashier is fully familiar with the facts below stated and hence makes this affidavit on behalf of said Howard Automobile Company.

That on or about the 2d day of June, 1922, Howard Automobile Company sold and E. O. Kildall purchased from said Howard Automobile Company, one Buick Roadster Model K-44 No. 568,923.

That said sale was evidenced by a certain agreement in writing executed on the 2d day of June, 1922, and that a true copy of said agreement is annexed to this affidavit and made a part thereof for all purposes.

That the purchase price agreed upon between the buyer [2] and the seller for the said automobile was Nine Hundred Seventy-eight and 60/100 (\$978.60) Dollars, to that Three Hundred Seventy-eight and 60/100 (\$378.60) Dollars, was paid at the time of delivery of said automobile and subsequently thereto monthly payments upon the balance due were made so that at this time there remains due from the said date E. O. Kildall to Howard Automobile Company on account of the said balance of said purchase price the sum of Four Hundred Fifty-eight and 60/100 (\$458.60) Dollars.

That under the terms of said contract the legal title to said automobile remains in the Howard Automobile Company until the full purchase price

of Nine Hundred Seventy-eight and 60/100 (\$978.60) Dollars has been paid.

That affiant is informed and believes that the said E. O. KILDALL, the defendant herein, has no property or assets of record in the City and County of San Francisco upon which an execution could be levied.

That one of the provisions of said contract of sale is that the purchaser shall not at any time permit the said automobile to be removed from his possession or to permit any adverse claim of any character against the same, and not to operate the same contrary to law.

That affiant is informed and believes and on such information and belief states that in the month of October, 1922, in the City and County of San Francisco, State of California, the said defendant, E. O. Kildall, was arrested and the said automobile was seized for the alleged unlawful transportation of intoxicating liquor in violation of the so-called National Prohibition Act and that the said Automobile is now in the possession and custody of the United States Prohibition Enforcement Officer at San Francisco, California, and that said automobile is subjected [3] to the further order of this Court.

Affiant further states that at the time said automobile was entrusted to the care and custody of E. O. Kildall, defendant herein, this affiant had no knowledge or information nor has said affiant had any notice or information or suspected that at the time said automobile was entrusted to the care and custody of E. O. Kildall, defendant herein, and the

Howard Automobile Company had no knowledge or information nor has it had any notice or information or suspected that said E. O. Kildall, since that time intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

CHAS. T. DODGE.

Subscribed and sworn to before me this 22d day of December, 1922.

[Seal]

GERALD A. GRIFFIN,

Notary Public, in and for the City and County of San Francisco, State of California.

Petition of Howard Automobile Company for Return of Automobile.

Wherefore your petitioner, Howard Automobile Company, prays for an order of this Court restoring and surrendering to it the said automobile in accordance with the provisions of said contract of sale hereto annexed, because of the breach by the purchaser of one of the essential conditions of said contract; or if the said automobile is not so restored and surrendered to your petitioner but the same be sold in the manner provided by law that in that event, the amount due your petitioner be paid in full out of the moneys realized from said sale, unless the amount paid for said automobile at the time of said sale be less [4] than the amount of the lien of your petitioner, Four Hundred Fifty-eight and 60/100 (\$458.60) Dollars, in

which event your petitioner prays that the said automobile be returned to your petitioner.

P. R. LUND,
Attorney for Petitioner, No. 444 California Street,
California.

Receipt of copy acknowledged this 26th day of
December, 1922.

JOHN T. WILLIAMS,
K.
U. S. Attorney.

[Endorsed]: Filed December 26, 1922. Walter
B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

[5]

Lease

Howard Automobile Company,

hereinafter called "Lessor," hereby leases to

R. O. Kildahl,

hereinafter called "Lessee," whose postoffice

address is 342 Lankershim Hotel, S. F.

and said Lessee hereby leases from

said Lessor, for a term commencing at the date hereof and ending on the 2nd day of June 1923, the following described property, to-wit:

That certain Brick Roadster Model K-44 No. 568923 together with all added or substituted parts placed thereon, whether caused by necessary repairs or otherwise, which said property is contemporaneously herewith delivered to the possession of said Lessee subject to the terms of this lease and not otherwise; and said Lessee agrees to pay to the Lessor, solely as consideration for the rental, hire and use of said property, the sum of Nine hundred seventy eight & 60/100 - - - 978.60 Dollars, U. S. Gold Coin,

to be paid in the following manner: \$300.00 upon the execution of this lease, and \$978.60 as follows:
\$56.50 on January 2, 1923 \$56.60 on May 2, 1923 \$56.50 on September 2, 1922
\$56.50 on February 2, 1923 \$57.10 on June 2, 1923 \$56.50 on October 2, 1922
\$56.50 on March 2, 1923 \$56.60 on July 2, 1923 \$56.50 on November 2, 1922
\$56.50 on April 2, 1923 \$56.60 on August 2, 1923 \$56.50 on December 2, 1922
and such other sums as are hereinafter mentioned, together with interest from date on all amounts of rent until paid, at the rate of eight per cent per annum, payable on the date that the installment of rent shall fall due.

(1) Said Lessee agrees during the life of this lease to exhibit said property upon demand to said Lessor or Lessor's agent, and as part of the rental thereof to keep said property in good order and repair to the satisfaction of Lessor, and free of all liens, and to promptly pay all taxes and licenses levied or assessed thereon, and to pay, from time to time, the premiums on policies

of insurance thereon against fire, theft, transportation and collision. Cont. & Unemployment be immediately taken out by Lessor in Lessor's name; all policies to be retained by Lessor, and all payments of losses under said policies shall be in liquidation pro tanto of the total rental. If said Lessee does not pay within five days any indebtedness due anyone having a lien or claim of lien thereon upon said property for any reason, or pay all taxes and licenses, or any premium on any insurance policy, all as aforesaid, the Lessor may pay therefor, and such payments shall be immediately repayable by said Lessee to said Lessor. If said Lessee does not keep said property in good order and repair, as aforesaid, the Lessor may, without suit or hindrance, take possession of said property and put it in good repair and condition at Lessee's expense, and the cost thereof, may be paid by the Lessor, and such payments shall be immediately repayable by said Lessee to said Lessor; but the taking of possession of said property by the Lessor for said purpose shall not operate as a termination of this lease.

(2) Should said Lessee make default in the payment of any of the said several amounts when due, or in the event of Lessee's failure to perform any of the conditions and covenants herein contained, or in the event that the Lessee shall become financially involved or insolvent, or in the event that Lessee shall fail to pay the cost of said insurance, without notice or demand, all payments herein provided for shall be due and payable at once, or the Lessor may immediately take possession of said property, whenever and wherever found, without process of law using all necessary force to do so, and all payments previously made by the Lessee shall be construed to be and applied as compensation for depreciation in value and for the use of said property, and the Lessee hereby waives and relinquishes all rights to the moneys so paid and all rights against the Lessor for taking possession of said property.

(3) Any loss or destruction of, or damage to, said property, through any cause whatsoever, while not in the possession of Lessor, is at Lessee's risk; and Lessee shall not thereby be released from the obligation of paying the aforesaid rental and performing each and all of the provisions hereof.

(4) Said Lessee agrees that during the life of this lease, he will not, and has no right to, assign, pledge, mortgage, or otherwise dispose of this lease or possession of said property, or any part thereof, in any manner whatsoever, or use, or permit same to be used, for rental purposes, or remove the same from the State of California, or incur any bill or bills other than with Lessor for repairs to said property in excess of \$50.00, without the written consent of said Lessor.

(5) Said Lessee agrees to save said Lessor harmless from any and all liability, including all costs and attorney's fees, for injury or damage to persons or property caused in any way, or in any place, by the use of said property during the life of this lease.

(6) In case suit is brought or other proceedings taken by Lessor to recover said property, or any part thereof, or any part of the amount due under this lease, and said Lessee agrees to pay all costs, and there shall immediately become due and payable \$100 as and for attorney's fees to said Lessor, and said Lessee further agrees that in the event of a breach of any terms of this lease, the Lessor may, at his option, commence an action or proceeding in any county or city and county in the State of California, for the recovery of said property, and all or any part of the amount due under this lease.

(7) It is mutually agreed that all new tires, accessories and equipment of whatsoever character which may be installed upon or added to said property while same is in the possession of the Lessee, shall be deemed to become a part thereof and shall be surrendered with said property to said Lessor if he retakes possession thereof under any of the terms of this contract.

(8) The title to the said property shall remain solely in the Lessor until all of the said payments are made and all of the conditions herein contained fully complied with. Possession of said property shall give the Lessee no title or interest therein and no rights except as hereinafter provided. Upon the full performance of all of the said conditions and promises by the Lessee, the Lessor or his assigns will execute to the Lessee a Bill of Sale of the said property.

(9) Time is of the essence hereof in each and every particular, and the acceptance of any partial payment or of any payment after same is due hereunder, shall not be deemed a waiver thereof; and no person has any authority to waive, alter, or enlarge this lease, or to make any new or substituted or different lease, or any representation or warranty by the insertion of the same in this lease, or otherwise, or to bind the Lessor by any understanding, agreement, or representation, or by any act, lease, contract, or statement, that is not contained herein, unless such person has theretofore been duly authorized in writing by the Lessor, or his manager.

(10) It is agreed that said property is now in good repair and condition and that this instrument contains the entire agreement between the parties and shall at all times be construed as a lease and option to purchase, as above provided, and not otherwise, and any benefit under any other construction is hereby waived. This lease shall not be binding on Lessor unless

signed by C. T. Dodge

(11) As a part of this lease, it is further agreed that in the event the Lessor shall assign and transfer this contract and the moneys payable thereunder to a third party, then the Lessee shall be precluded from in any manner attacking the validity of this contract on the ground of fraud, duress, mistake, want of consideration or failure of consideration or upon any other ground, and all moneys payable under this contract by the Lessee shall be paid to such assignee or holder without recoupment, set-off or counterclaim of any sort whatsoever.

(12) It is distinctly understood and agreed that during the term of this lease, the automobile herein leased shall not be used for the transportation of intoxicating liquors, drugs or narcotics, and shall not be used in or about the violation of any United States, state or municipal statute, law or ordinance. Any violation of this provision shall forthwith terminate this lease and any and all rights of the Lessee in or to said automobile and the possession thereof, and without notice or demand of any character, the Lessor shall take immediate possession of said automobile and all accessories, using all necessary force to do so, and any and all rights of the Lessee in or to said automobile or the possession thereof shall thereupon be immediately forfeited and the Lessor shall be and become the sole owner of the same and each and every part thereof and right and interest therein and shall be alone and solely entitled to the possession thereof, and all payments previously made by the Lessee shall be retained for depreciation in value and for the use of said automobile, and the Lessee hereby waives all rights to the moneys so paid and all rights against the Lessor for taking possession of said automobile.

(13) This lease shall bind and inure to the benefit of the heirs, executors, and administrators of the parties hereto, and the assigns of Lessor.

(14) This lease is executed in duplicate, of which one copy is delivered to the Lessor, and the other copy is delivered to the Lessee.

Executed in duplicate at San Francisco California, this 2nd day of June 1922

The principal place of performance of all the terms mentioned herein is to be the city of San Francisco and county of San Francisco

HOWARD AUTOMOBILE CO.

C. T. Dodge

Lessor,

(Signed) R. O. KILDALH

Lessee.

COPY

DATE	PAID	BALANCE
5-8 22		678.60
7-5 22	56.50	622.10
8-3 22	56.50	565.60
9-30 22	56.50	509.10
10-3 22	56.50	452.60

No. K-44

LEASE

From

HOWARD AUTOMOBILE CO

To

E. O. Kildall

518 Grand Hotel

San Francisco

Date 6-2-22 192

Payments to become due as follows:

- Jan. 56.50
- Feb. 56.50
- March 56.50
- April 56.50
- May 56.50
- June 57.10
- July 56.50
- Aug. 56.50
- Sept. 56.50
- Oct. 56.50
- Nov. 56.50
- Dec. 56.50

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH HATFIELD BAKER and EDDIE
OREN KILDALL,

Defendants.

Answer to Petition of Howard Automobile Company for Return of Property.

Comes now the above-named plaintiff, by John T. Williams as United States Attorney in and for the Northern District of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of the defendant herein for a return of certain personal property, denies and alleges as follows:

Respondent has no information or belief respecting the allegation in petitioner's petition herein, to wit: "That petitioner has no knowledge, information or suspected that at the time said automobile was entrusted to the care and custody of E. O. Kildall intended to use or was using said automobile in unlawfully transporting intoxicating liquor" sufficient to enable him to answer the same, and basing his denial upon that ground denies

that petitioner had no knowledge or information, or did not suspect at the time said automobile was entrusted to the care and custody, or care or custody of the said E. O. Kildall, that the said E. O. Kildall intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

Alleges: That the facts and circumstances respecting the taking of said automobile herein, are fully set out in the affidavit of Y. L. Harvill, who was at the time of the seizure of the said personal property a Prohibition Agent and acting as such, which said affidavit is hereto attached, made part hereof, and marked Exhibit "A." [8]

WHEREFORE respondent prays that the said petitioner's petition herein be denied.

JOHN T. WILLIAMS,

United States Attorney,

BEN F. GEIS,

Assistant United States Attorney,

Attorneys for Respondent. [9]

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH HATFIELD BAKER and EDDIE
OREN KILDALL,

Defendants.

Affidavit of Y. L. Harvill.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Y. L. Harvill, being first duly sworn, deposes and says: That he is and at all of the times herein mentioned was in the employ of the Government of the United States as Federal Prohibition Agent, and acting as such under the direction of the Federal Prohibition Director of the State of California, to wit, Samuel F. Rutter.

That prior to the 23d day of October, 1922, one of the Federal Prohibition Agents, without disclosing his being such agent, made an agreement with the defendants for the purchase of certain intoxicating liquor, to wit, whiskey and gin, which was to be delivered by the said defendants to the said Federal Prohibition Agent on the 23d day of October, 1922, at and in the City and County of San Francisco, State of California; that affiant and other prohibition agents on the 23d day of October, 1922, and for the purpose of receiving delivery of said liquor, went to the Grand Hotel in said City and County of San Francisco, State of California, where the defendants then and there resided, and thereupon an automobile drove up in front of said hotel, one of the said defendants driving the said machine, and the [10] intoxicating liquor hereinbefore mentioned was then and there in the said automobile, and the other defendant together with afore-

said prohibition agent entered the said automobile and drove to Hyde Street between Golden Gate and Turk Streets, in the said City and County, followed by affiant and other prohibition agents, at which point affiant saw the other prohibition agent paying the said defendants for the said intoxicating liquor; that affiant and the other prohibition agents then and there arrested the said defendants, seized the said liquor and automobile, and which said liquor and automobile is now in the possession of Samuel F. Rutter as Federal Prohibition Director in and for the State of California; that at the time of said arrest and seizure the said defendant Kildall stated to affiant that he was the owner of the said automobile, which said automobile is the Buick roadster mentioned and described in petitioner's notice of motion herein; that at the time of the transporting of said liquor by the said defendants, the said defendants had not, nor had either of them any permit authorizing them or either of them to have possession of, or transport said or any intoxicating liquor; that immediately thereafter affiant filed an information charging the said defendants with possession and transportation of said intoxicating liquor.

Y. L. HARVILL.

Subscribed and sworn to before me this 27th day of January, 1923.

[Seal]

C. W. CALBREATH,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 7, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

No. 12,188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

No. 12,296.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. O. KILDALL et al.,
Defendants.

No. 12,957.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACK MODESTI,
Defendant.

Order Denying Motion (for Return of Automobile).

PARTRIDGE, JOHN S. [12]

In each of the above-entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition law provides:

“Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile . . . and shall arrest any person in charge thereof. The courts, upon conviction of the person so ar-

rested, shall order the liquor destroyed and, unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale . . . shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor.”

[13]

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Silvester*, 273 Fed. 253, allowed a lien for the amount of the unpaid purchase price under what the opinion calls “a conditional bill of sale,” although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit “a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law.”

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshal Montgomery et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: “It is not unreasonable to suppose Congress had in mind the fact that an

owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession.”

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this State that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. App. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price: [14]

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company*, 101 Cal. 37; *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony*, 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States* No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved was whether Section 3450 of the Re-

vised Statutes had been repealed by the provisions of the National Prohibition Act. It was clearly recognized that under Section 3450, the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provisions of the Revised Statutes was in effect repealed by Section 26 of the National Prohibition Act. It is therefore apparent that unless language is found in Section 26 which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:
[15]

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

[Endorsed]: Filed Apr. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[16]

In the United States District Court for the Northern District of California.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Petition for Appeal.

To the Honorable JOHN S. PARTRIDGE, District Judge.

The Howard Automobile Company, petitioner herein, feeling aggrieved by the order and decree rendered and entered in the above-entitled cause on the 14th day of April, A. D. 1923, does hereby appeal from said order and decree to the Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said order and decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, under the

rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed] Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[17]

In the United States District Court for the Northern District of California.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Assignment of Errors.

Now comes the Howard Automobile Company, petitioner herein, in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree and order made by this Honorable Court on the 14th day of April, 1923.

I.

That the United States District Court for the Northern District of California erred in refusing

to render an order and decree pursuant to the petition of the Howard Automobile Company, filed in the above cause, applying for the return of it, the said Howard Automobile Company, of a certain Buick Roadster in said petition described.

II.

That the United States District Court for the Northern District of California erred in refusing to decree that the Howard Automobile Company have a lien, after deducting the cost of seizure and expenses of keeping and sale of the certain Buick Roadster, described in the petition of said Howard Automobile Company filed herein, to the extent of Four Hundred [18] Fifty-eight and 60/100 (\$458.60) Dollars.

III.

That the United States District Court for the Northern District of California erred in refusing to decree that the Howard Automobile Company have a lien upon the proceeds of the sale of the certain Buick Roadster described in the petition of the said Howard Automobile Company filed herein.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[19]

In the United States District Court for the North-
ern District of California.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Order Allowing Appeal.

On motion of P. R. Lund, Esq., solicitor and counsel for the Howard Automobile Company, petitioner herein, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Judicial District from an order and decree heretofore filed and entered herein, be, and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the Ninth Judicial District. It is further ordered that the bond on appeal be fixed in the sum of \$500.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

JOHN S. PARTRIDGE,

Judge.

Dated this 24th day of April, 1923.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the United States District Court for the Northern District of California.

No. 12,996.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Supersedeas Order.

This cause coming on to be heard this — day of April, 1923, upon the application of the appellant for an appeal to the Circuit Court of Appeals for the Ninth Judicial District and said appeal having been allowed, it is ordered that the same shall act as a supersedeas, the said appellant having executed bonds in the sum of \$500.00 as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the Northern District of California until the further order of this court.

JOHN S. PARTRIDGE.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[21]

In the United States District Court for the Northern District of California.

No. 12,996.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL,

Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, a corporation organized and existing under the laws of the State of New York, and licensed and authorized to conduct a bonding and surety business within and under the laws of the State of California is held, and firmly bound unto the United States of America in the full and just sum of \$500.00 to be paid to the said United States of America; to which payment well and truly to be made, the said Globe Indemnity Company hereby binds itself, its successors and assigns, by these presents.

Signed, sealed and executed at San Francisco, California, this 26th day of April, A. D. 1923, on behalf of the Globe Indemnity Company by its attorney-in-fact, thereunto duly authorized.

Whereas, lately at a District Court of the United States for the Northern District of California in the above-entitled cause depending in said Court, an order and decree was rendered against the

Howard Automobile Company, petitioner, in intervention in said action, and the said Howard Automobile Company having obtained from the Court, an appeal to reverse the order and decree [22] in the aforesaid intervention and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Howard Automobile Company shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GLOBE INDEMNITY COMPANY,
(Signed) By J. B. ELLIOTT, (Seal)
Attorney-in-fact.
J. B. ELLIOTT.

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[23]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 23

pages, numbered from 1 to 23, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of United States of America, vs. Eddie Oren Kildall et al. (Howard Automobile Co, Claimant of Automobile), No. 12,-296, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein) and the instructions of the attorney for claimant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eight Dollars and Seventy-five cents (\$8.75), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of May, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [24]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to UNITED STATES OF AMERICA and to the Honorable JOHN T. WILLIAMS, United States Attorney, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein United States of America is plaintiff and E. O. Kildall is defendant and petitioner in intervention, Howard Automobile Company, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 26th day of April, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: No. 12,296. United States District Court for the Northern District of California. Howard Automobile Company (a Corporation), Appellant, vs. United States of America. Citation on Appeal. Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[25]

[Endorsed]: No. 4027. United States Circuit Court of Appeals for the Ninth Circuit. Howard Automobile Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 8, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT 2**

HOWARD AUTOMOBILE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

BRIEF FOR APPELLANT

P. R. LUND,

Attorney for Appellant.

FILED
FEB 14
1934

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No. 4027

United States Circuit Court of Appeals
For the Ninth Circuit

HOWARD AUTOMOBILE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

THE FACTS

This is an appeal from an order of the United States District Court for the Northern District of California, denying the relief sought by the intervenor there and appellant here, Howard Automobile Company, through a petition for the return of personal property; or in lieu of the return thereof, the establishment of a lien in favor of petitioner upon the proceeds derived from the sale of said personal property, the said petition in intervention having been filed in the proceeding entitled "United States of America versus E. O. Kildall, *et al.*," No. 12296 upon the records of said Court.

Said intervening petition (R2) shows that on June 2, 1922, an agreement, generally known as a contract of conditional sale, or a conditional sales

contract, was entered into between Howard Automobile Company, and one E. O. Kildall, for the purchase by the latter from Howard Automobile Company of an automobile, of a model known as a "Buick Roadster", and which was particularly described in said contract, a copy of which is attached to the intervening petition (R6).

The purchase price agreed upon was \$978.60. At the time the contract was executed, the sum of \$378.60 was paid by Kildall to the vendor, Howard Automobile Company. The balance of the purchase price, it was agreed should be paid in monthly installments. The vendor reserved to itself title to said automobile until the full amount of the agreed purchase price was paid, upon which event the automobile, by the terms of the contract, was to become the absolute property of Kildall; but, by the terms of the contract, Kildall was entitled to immediate possession of the automobile and he was entitled to possess and control the same at all times from the date of the contract so long as he made the installment payments and observed the conditions of the contract.

On the date the contract was executed, June 2, 1922, Kildall took possession of the automobile and thenceforth it was under the control of Kildall.

The transaction, as is the case in the great majority of instances when automobiles are sold upon installment payment terms—and it is matter of

common knowledge that large numbers of automobiles are so sold—did not differ materially from a transaction wherein a part of the purchase price is paid at the time of delivery and a chattel mortgage upon the automobile is taken by the vendor to secure payment of the balance of the purchase price. It differed not at all as to any control of the automobile by the vendor, so long as the vendee observed the conditions of the contract.

The intervening petition (R2) states that at the time said automobile was entrusted to the care and custody of Kildall, the petitioner, Howard Automobile Company, had no knowledge or information, nor had the petitioner at that time or subsequently—until the arrest of said Kildall, as hereinafter set forth—any notice or information, nor had petitioner suspected, that at the time said automobile was entrusted to Kildall, or subsequently, that Kildall intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

From the time of the delivery of the automobile until the arrest of Kildall, he made the payments provided for in the said contract and performed the conditions thereof; so that during that time he was entitled to retain undisturbed possession and full control of the automobile and the Howard Automobile Company could not have exercised any control over it. The charge upon which Kildall was arrested was for a first offense and there is no pretense that he was a known offender against the National Prohibition Act.

In the month of October, 1922, Kildall and a companion were arrested for the illegal transportation of intoxicating liquor, and the said automobile was seized by the prohibition enforcement officers.

At said time there remained due to Howard Automobile Company, as the balance of the purchase price of the said automobile, the sum of \$458.60. No payments on account thereof have since been made, and the said \$458.60 is still unpaid.

In December, 1922, Howard Automobile Company, filed its intervening petition and prayed an order restoring it to possession of said automobile, or, in lieu thereof, for an order establishing a lien in favor of petitioner upon the proceeds realized from the sale of said automobile to the amount of \$458.60. (The statement in the opinion of the District Court (appendix) to the effect that the petition asked for the *return* of the automobile only, is incorrect—see prayer of petition (R5.)

Subsequent to the filing of this petition, Kildall entered a plea of guilty, and was sentenced to pay a fine.

Thereupon the United States Attorney filed a purported answer (R9) to said intervening petition. This document did not deny or traverse any of the statements or allegations of the petition. On the contrary, it contained merely a statement, which if true, would establish the guilt of Kildall of illegally transporting intoxicating liquor; but, it

in nowise alleged any guilt or guilty knowledge on the part of petitioner, Howard Automobile Company.

At no stage in the proceedings in the District Court was there any attempt by the Government, by pleadings, by affidavits, by the introduction of testimony, or otherwise, to show any guilt, possession of guilty knowledge or fault of any character on the part of the petitioner, Howard Automobile Company.

The said intervening petition and its accompanying affidavit, together with the purported answer of the Government thereto, was submitted to the District Court, and on April 14, 1923, the Court made an order denying the prayer of the intervening petitioner for the return of said automobile and refusing to establish any lien in favor of the intervening petitioner upon the proceeds to be derived from the sale of said automobile.

ARGUMENT

1. Nothing to be found in the laws of California demands a disposition of causes of this character different from that made in other jurisdictions.

In the case of *United States vs. Sylvester*, 273 *Fed. 253*, the United States District Court for Connecticut, in a case similar in all respects to the instant one, says:

“What, then, is to become of the interest of the conditional vendor or the interest of the mortgagee? Are such persons to lose their interest in the vehicle or the value of their property right? The answer is a negative one, and is found in the provisions of Section 26, which guard against such loss, as far as possible.”

The pertinent provision of Section 26 of the National Prohibition Act are as follows:

“Whenever intoxicating liquors transported * * * illegally shall be seized by an officer he shall take possession of the * * * automobile * * * and shall arrest the person in charge thereof. * * * The court, upon conviction of the person so arrested shall order the liquor destroyed, *and unless good cause to the contrary is shown by the owner*, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which

are established, by intervention or otherwise, at said hearing or in other proceedings brought for said purpose, as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor.”

The District Court for Connecticut, in applying the provisions of the statute follows the well-established rule of giving effect to *the whole*. It recognizes that the law intends to protect innocent persons from unnecessary and unjust loss, and recognizes that the vendor under a conditional sales contract, as well as the mortgagee, is entitled to protection, as, indeed, the very letter of the law provides.

The District Court in the instant case cites six California decisions which hold, in effect at least, that the vendor in a contract of conditional sale is the owner of the chattel sold until all the terms of the contract to be performed by the vendee are fulfilled—and, the Court says:

“It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government.

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.”

From which it may be fairly inferred that the District Court is of the opinion that the status assigned by state laws to a vendor under a conditional sales contract may govern his rights under Section 26 of the National Prohibition Act, and that he might have rights to protection in some jurisdictions, whereas he has none in others.

We are well aware that the decision of the Court in *United States vs. Sylvester* is not binding upon the District Court of California, but it should have sufficient persuasive weight to warrant the inquiry whether a difference in State laws justifies two diametrically opposing decisions in similar circumstances by courts of the same judicial system. The examination can perhaps be most quickly made by setting out a few of the chief characteristics of conditional sales contracts and the propositions of law applicable.

a. The validity of conditional sales contracts is well settled.

b. The nature of the contract is to be determined by all its terms—calling it a “lease”, a “mortgage”, etc., does not affect its character.

c. Title to thing sold remains in vendor until vendee has complied with terms of contract. Vendor in meanwhile is the owner of the chattel.

d. Upon breach of vendee, vendor has two remedies—he may repossess the chattel or sue for the amount due.

e. Having two remedies, vendor must choose one; he cannot pursue both.

Having set out these few propositions—we do not consider this phase of sufficient importance, as will appear later, to occupy the time of the Court with more—let us see if there is any difference between the laws of California and Connecticut which would warrant the chasm between *United States vs. Sylvester* and this case. *The difference is not to be found.* There is not to be found a distinction in the decisions of the two states. Taking the propositions in the order above given, we have the following paralleling decisions:

- a. *Liver vs. Mills*, 155 Cal. 459;
Greene vs. Carmichael, 24 Cal. App. 27;
Cooley vs. Gillan, et al, 54 Conn. 80.
- b. *The Parke & Lacy Co. vs. The White River Lumber Co.*, 101 Cal. 37;
Kohler & Chase vs. Hayes, 41 Cal. 585;
Miller vs. Steene, 30 Cal. 402;
Hine vs. Roberts, 48 Conn. 267;
Loomis vs. Bragg, 50 Conn. 228;
Bohmann vs. Perrett, 97 Conn. 571.
- c. *Potts Company vs. Benedict*, 156 Cal. 322;
Waltz vs. Silveria, 25 Cal. App. 717;
Henry Lewis, et al vs. McCabe, et al, 49 Conn. 141.

- d. *Holt Mfg. Co. vs. Ewing*, 109 Cal. 353;
Muncy vs. Brain, 158 Cal. 300;
Adams vs. Anthony, 178 Cal. 158;
Appleton vs. Norwalk, etc., 53 Conn. 4;
Crompton vs. Beach, 62 Conn. 25;
Alfred Fox Piano Co. vs. Bennett, 96 Conn.
 448.
- e. *Parke & Lacy Co. vs. White River Lumber
 Co.*, *supra*;
Holt Mfg. Co. vs. Ewing, *supra*;
Muncy vs. Brain, *supra*;
Hughes vs. Kelly, 40 Conn. 148;
Griffin vs. Ferris, 76 Conn. 221.

As there exists no difference between the law relating to conditional sales contracts in California and Connecticut, the decisions in *United States vs. Sylvester* and that in the case at bar cannot be reconciled on that score. In fact, we do not believe that they can be composed at all, and it is our view that the quotation above from the *Sylvester* decision is the correct interpretation of Section 26 of the National Prohibition Act, and expresses the intent of the Congress that enacted it, and that the decision in this case does not. The conclusion is forced upon us in small part only by what we have disclosed as to the laws of the respective states, and which would be found in comparison of the laws of almost any other states, but mainly by what appears to us to be

more pertinent features of the case, to which we will now pass.

2. State laws do not constitute a rule of decision in causes of this nature, nor can the status of a party or his rights in such cause be defined by reference to state laws.

Section 721, Revised Statutes;
Section 1538, Compiled Statutes.

“The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”

This is also the language of Section 34, Chapter 20 of the Act of September 24th, 1789, and it is therefore, the statute that was under consideration in *Swift vs. Tyson*, 16 Peters 1 and *Bucher vs. Cheshire R. R. Co.*, 125 U. S. 610, and the numerous decisions intermediate of the two and subsequent to the last mentioned case.

Some jurists have observed that these decisions are not always harmonious. Be that as it may, we think that whatever want of accord may exist relates to governing force of State laws in actions at common law, and that it has never been held that State laws form rules of decision in Federal Courts in the interpretation of statutes of the United States, in equity or in criminal prosecutions.

This cause is not an action at common law. It is an appeal for equitable relief in a proceeding authorized by a statute of the United States.

Federal statutes must be interpreted by Federal Courts, irrespective of State decisions.

Calhoun Gold Mining Co. vs. Ajax Gold Mining Co., 182 U. S. 499;

West Virginia vs. Adams Express Co., 219 Fed. 794.

In *Calhoun Gold Mining Co. vs. Ajax Gold Mining Co., supra*, the Supreme Court says in refusing to give countenance to a decision of the Supreme Court of Colorado:

“There is serious objection to accepting the consequence as determinative of our judgment. We might by so doing confirm titles in Colorado, but we might disturb them elsewhere. The statute construed is a Federal one, being a law not for Colorado, but for all the mining States, and, therefore, a law for all, not a rule for one, must be declared * * * The court must interpret the statute independently of local considerations.”

The National Prohibition Act is a law for all the states. By every reason, it must be interpreted independently of local State laws.

State laws are not regarded in suits in equity in Federal Courts.

Neves vs. Scott, 13 How. 268;

Russell vs. Southard, 12 How. 139;

Boston, etc. vs. Slocum, 77 Fed. 345;
Butler et al vs. Douglass, 3 Fed. 612;
Johnston vs. Roe, 1 Fed. 692.

State laws do not constitute a rule of decision in criminal prosecutions in United States Courts.

Bucher vs. Cheshire R. R. Co., *supra*;
U. S. vs. Reid, 12 How. 361;
U. S. vs. Hall, 53 Fed. 352;
Logan vs. U. S., 144 U. S., 302;
U. S. vs. Jones, 10 Fed. 469.

Therefore, if the view should be taken that the proceeding instituted by petitioner in the District Court was part of a criminal prosecution, State laws could not be resorted to to determine petitioner's status or classification nor any rights or disabilities which it may have in that proceeding.

3. If a law is capable of more than one interpretation, Federal Courts will select that construction which is most equitable and just.

It has been seen that two very different interpretations of the same section (Section 26) of the National Prohibition Act have been indulged in by judges of two United States District Courts. We think it has been made to appear that this difference is in nowise called for or compelled by any controlling force which local State laws may exercise upon the decision of Federal Courts in causes of this character. Plainly, the Federal Courts are left in an en-

tirely independent position as regards state influence in interpreting and applying the provisions of a Federal statute.

Assuming that the statute is capable of more than one interpretation, which shall it be—one that seeks in the words of the written law authority to deal justly with the innocent, to protect such persons in their property rights and prevent unnecessary loss to them so far as may be, or, one that by strained construction, by disregard of the language of the statute, by unwarranted assumptions as to the legislative intent, attempts not to deal as justly as may be with the innocent, but hands out forfeiture, confiscation and causes unnecessary and destruction loss to those who are guilty of no more than having been engaged in a very large and important business in this country, and having employed in that business methods long sanctioned by the laws of every State in this nation?

The instruments to choose from are ready made in the decision of *United States vs. Sylvester, supra*, and in the decision in this case in the Court below as well as the decision of the United States District Court for Arizona in the case of *United States vs. Marshall Montgomery*, designated upon the records of that Court as C-448.

The Montgomery case appears to have largely influenced the decision of the Court below, for it quotes from it and approves the following language:

“It is not unreasonable to suppose that Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession.”

The quoted language was used by the District Court for Arizona in deciding a case similar to this, so the “owner” referred to is, as is the petitioner here, the vendor under a conditional sales contract.

With the conclusions of the Court we respectfully but very decidedly differ.

It is unreasonable to suppose that the Congress in enacting Section 26 of the National Prohibition Act, which deals largely with the subject of vehicles used in the illegal transportation of liquor, was entirely ignorant of the business methods of one of the country’s largest industries—the automotive industry. It is unreasonable to suppose that the Congress was entirely ignorant of the fact that conditional sales contracts are largely employed in the sale of automobiles—that probably one-half, or more, of all automobile sales were effected upon such contracts. It is unreasonable to suppose that Congress was entirely ignorant of the characteristics of a business instrument such as the conditional sales contract, which is so extensively used not only in the automotive industry, but which has been used for half a century or more in almost unenumerable other industries in this country. It is unreasonable to sup-

pose that Congress did not know that the chief office of the conditional sales contract, like the chattel mortgage, was to secure the vendor in the collection of the balance due upon the purchase price of the article sold. It is unreasonable to assume that the Congress did not know that upon the execution of such a contract, the vendor delivered the article sold into the possession of the vendee, and that from that time on the vendor had no more control or right of control over the chattel than a mortgagee under a properly worded chattel mortgage would have.

Upon a breach of a conditional sale contract, by the vendee, the vendor may repossess the chattel or sue for the balance due. Upon the breach of the conditions of a chattel mortgage, the mortgagee may take possession of the chattel covered by the mortgage, or he may sue for the amount due. The only difference in the position of the two parties is that if the conditional sales vendor repossess the property, it is his without further procedure, because he has never parted with the title, whereas the mortgagee must foreclose the mortgagor's interest in the property before he can obtain title. *A mere difference in procedure after breach by the vendee, but no difference in the amount or degree of control of the property that may be exercised by the vendor or mortgagee before any breach occurs.*

It is unreasonable to suppose that the Congress was ignorant of this situation.

It is unreasonable to suppose that the Congress, knowing the similarity in interests between those of conditional sales vendor and chattel mortgages, would take pains to protect the interests of the latter and leave those of the conditional sales vendor—by far the more numerous class—subject to forfeiture and confiscation without hope of redress.

In the decision in the Montgomery case, above referred to, the Court also says:

“I am, therefore, of the opinion that an owner while retaining title in himself delivers a car on conditional sale with power to use it in any way that the buyer may desire cannot escape a forfeiture if the buyer uses it unlawfully, by claiming that such unlawful use was without his knowledge.”

We contend that this conclusion is contrary not only to the intent, but to the very language of the National Prohibition Act. By Section 26 of the Act the Court “shall order the vehicle to be sold, *unless good cause to the contrary is shown by the owner.*”

An owner, among laymen as well as lawyers, is considered to be, according to this country’s best known lexicographer—Webster:

“One who has the legal or rightful title, whether he is in the possession or not.”

Unless the contrary appear—and it does not appear in the case of Section 26—that words are used

in a different meaning, their ordinarily accepted meaning must be accorded them.

Therefore, from the well-understood meaning of the word “owner”, as well as the knowledge that the Congress must have had of the characteristics of conditional sales, and from the context of the section itself, it is plain that the “owner” referred to in Section 26 of the National Prohibition Act is not restricted to an owner in possession, *but to an owner in the fullest meaning that our language accords to the word.*

Manifestly the statute cannot refer to an owner in actual possession. In that case he would be the person guilty of illegally transporting liquor, and he could show no cause whatsoever why the vehicle should not be confiscated. It is impossible to suppose that the Congress intended to provide for such a burlesque situation.

If it means an owner who has voluntarily parted with possession of the vehicle—such as lent it—he cannot, during the duration of the loan, exercise any more actual control over the use and movements of the vehicle than can the conditional sales vendor. If he accompanies the vehicle and controls its use, and it is employed to illegally transport liquor, the owner is a co-defendant, and in no better position to show “good cause” than if he had been operating alone.

If the Court’s conclusions are to be accepted, it would restrict the “owner” who can show “good

cause” to one from whom the vehicle has been stolen and then used for the illegal transportation of liquor, which is to assume that the Congress took pains to protect a few isolated owners to whom such a contingency might happen, and left the thousands of conditional sales vendors to the “mercy” of confiscation, and in the very same section of the Act provided protection for the interests of the mortgagee.

The fact that the “owner”—the conditional sales vendor—may sue the vendee for the balance due, is not an answer to our contention, nor should it favorably address itself to the conscience of the Court.

The statute gives to the owner a remedy to which he is entitled. This cannot be taken away on the ground that he can recover judgment against the vendee for the amount still unpaid.

Conditional sales contracts are exacted from purchasers of automobiles because they either have not the means to pay, at one time, the entire purchase price, or their property is in such condition that they are not considered sufficiently solvent for an open credit. A money judgment against many of these vendees would be worthless. Such a judgment against those who have become so shiftless and reckless as to engage in illicit liquor traffic would in almost every instance be so. If it had been the intention of the lawmakers that this should be the only remedy of the conditional sales vendor, why was any provision made to protect the chattel mortgagee? He also can sue upon his note. It is incon-

ceivable that two men in practically the same situation should be so differently dealt with—one of them so unjustly.

It is our contention that such restricted application is unwarranted; that it ignores the meaning of the statute; that it is not in accord with the manifest intent of its framers and that it violates the principles of statutory construction enunciated by our Courts.

4. The District Court, in determining this cause has placed a construction upon the National Prohibition Act that is not warranted by its terms, and has employed standards of interpretation that are contrary to the rules of construction employed by Federal Courts.

“Of two constructions of a public law, both fairly possible, courts of law will adopt that which equity would favor.”

Washington R. R. vs. Coeur D'Alene Ry.,
160 U. S. 101.

As a matter of fact, Section 26, National Prohibition Act, in so far as it relates to the protection of an owner, in possession or out of possession, of a vehicle seized does not admit of two constructions. It is plain that he is to be protected upon “good cause” being shown; but, for the purpose of this argument, let us assume that either one of two constructions is fairly possible. One construction would be that upon the owner showing good cause, he is

entitled to relief from the seizure of his property; the other is that while the right to relief, in these circumstances is plainly indicated, no specific procedure has been provided, as in the case of the lienor, and consequently the owner is without remedy and he must suffer a total loss of his property.

Need we hesitate for a moment as to which construction equity would adopt? Had it been the practice of equity to hesitate in situations of this sort, our equity jurisprudence would either never have been written or it would convey doctrines far different from those that prevail.

In such a case, the right having been indicated, equity *would find* a remedy—a procedure. Moreover, if its hands were not tied by statutory enactments, in a case of this kind, equity would declare the existence of the right as well as apply the remedy.

The District Court has ignored this principle in deciding the instant cause:

Where the language of a statute is clear, the statute is not open to construction.

Yerke vs. U. S., 173 U. S. 442;

Hamilton vs. Rathbone, 175 U. S. 419.

The National Prohibition Act is plain in that an owner of a seized vehicle who shows good cause is entitled to protection against confiscation of his property. To hold otherwise is to ignore the plain language of the statute.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, *avoid an unjust or absurd conclusion.*

In re Chapman, 166 U. S. 667;

Law Ow Bew vs. U. S., 144 U. S. 59;

Sioux City R. R. vs. U. S., 159 U. S. 360;

U. S. vs. Kirby, 7 Wall. 486.

(We use the word “sensible” as employed in the decisions; no offensive meaning is to be implied.)

A sensible construction of Section 26, National Prohibition Act, could but lead to the conclusion that it was the legislative intention to prevent the vehicle of an owner who “shows good cause” from being confiscated, without granting such owner any redress whatsoever. A sensible construction of said Act would give effect to the legislative intention to give such owner a remedy in the premises besides his right to sue a very probably insolvent debtor who had turned a criminal. A sensible construction of said statute would have resulted in avoiding the unjust conclusion that an innocent person who shows good cause, as provided by the statute, shall be punished without redress. A sensible construction of said statute would have avoided the absurd conclusion that while the Congress had provided for the protection of an innocent owner, he was not entitled to such protection because the Congress had failed to prescribe minute details of procedure, but instead had seen fit to give the Court a free hand in

dispensing justice to the owner in proportion to the good cause shown.

Where a particular construction of a statute will work injustice or occasion great inconveniences, it is to be avoided in favor of another and more reasonable construction possible.

Knowlton vs. Moore, 178 U. S. 77.

The particular construction of the National Prohibition Act, adopted by the District Court in this cause, worked great injustice. Another and more reasonable construction was possible—the opportunity was and is provided by the language of the statute itself.

No statute ought to receive a construction that will render it nugatory, or which prescribes a rule utterly impracticable.

U. S. vs. Tappan, 11 Wheat. 426;

The Palmyra, 12 Wheat. 15.

The National Prohibition Act prescribes relief for *all owners* of seized vehicles who show good cause. The decision in the instant case renders nugatory this provision, save, *possibly*, to an extremely limited class of owners, but renders the property of the vast majority of innocent owners likely to become involved in cases of this character subject to confiscation without redress. As to practicability, the decision goes further and shuts the door upon all solutions, practical or impractical.

“Effect should be given to all the provisions of a statute.”

Rhodes vs. Iowa, 170 U. S. 422;

Bernier vs. Bernier, 147 U. S. 246;

Beley vs. Naphtaly, 169 U. S. 361;

Rice vs. The Minn., etc. R. R. Co., 1 Black 378;

Platt vs. Union Pacific R. R., 99 U. S. 58.

Where a statute covers *all* of a class, and a decision limits its application to but a small number of that class, eliminating the majority from participation in the relief provided, *it does not give effect to all the provisions of a statute*. A statute that employs the word “owner” without qualification, embraces all persons whom the word, in the broadest generally accepted meaning of our language includes. The meaning so given to the word “owner” includes an owner out of possession (such as a conditional sales vendor) as well as an owner in possession. The decision in this case eliminates from the provisions of the statute conditional sales vendors out of possession of their property.

It is the duty of the Court to give effect to every word in a statute if it can be done without violating the intention of the legislature.

U. S. vs. Gooding, 12 Wheat. 477;

Bend vs. Hoyt, 13 Peters 272;

Market Co. vs. Hoffman, 101 U. S. 115.

The decision of the District Court in the instant case does not give effect to every word in the statute

in that it restricts the meaning of an unrestricted word when no legislative intention to do so is apparent. In fact the legislative intention is violated by such restriction, as the intent appears that the word "owner" is employed without qualification.

Every word of a statute must, if possible, be given some effect; nothing is to be stricken out if it can be avoided; it is not to be presumed that the legislature intended any part to be without meaning.

Allen vs. Louisiana, 103 U. S. 84;

U. S. vs. Temple, 105 U. S. 99;

Montclair vs. Ramsdell, 107 U. S. 152;

U. S. vs. Fisher, 109 U. S. 145;

Murphy vs. U. Her., 186 U. S. 111.

It was possible in this case to give effect to the language of the National Prohibition Act, providing that when an owner shows good cause his seized vehicle shall not be sold. The District Court refused to give any effect to that provision. Ignoring the provision has the effect of striking it out of the statute. The decision in this case renders meaningless that portion of the Act which provides that upon the owner showing good cause his seized vehicle shall not be sold.

5. Suggestions regarding protection of interests of conditional sales vendors.

By the foregoing we trust that we have shown that the conditional sales vendor, in circumstances such

as are presented by this case, has rights of property which are recognized and safeguarded by the provisions of the National Prohibition Act.

How are such interests to be cared for?

The District Court for Arizona, in its decision in the *Marshall Montgomery* case, says that "the difference between the provisions applicable to owners and those applicable to lienors is 'significant'."

The "significant" circumstances to which the Court refers seem to have appeared to it sinister, to have played an important role in arriving at the decision rendered.

It requires only a fair consideration of the provisions of Section 26, however, to show that there is nothing either "significant" or sinister in the fact that as to the "owner", the section makes no specific provisions as to what action the Court shall take, when he, the owner, has shown "good cause".

No doubt the framers of the law had in mind that an "owner", whether he be an owner in possession or one out of possession, such as a conditional sales vendor, has full title, and if the vehicle is returned to him, *there is nothing more to do*. No elaborate procedure need be prescribed.

Why should a Court accustomed to equity causes consider itself helpless when authorized by statute to deal justly with persons before it, merely because the statute does not point out in minute detail the

procedure that should be followed. Had the statute, in addition to declaring the right also prescribed the relief and the procedure in its administration, the Court would be limited by those provisions; but, as the right is declared without limiting provisions as to procedure, it would appear that the proper course for the Court to pursue would be to dispose of the matter presented as the "good cause shown" requires.

In most cases of intervention by a conditional sales vendor, the proper relief, we feel, would be to order the vehicle returned to such vendor.

The absence of procedure provisions as to an intervening "owner" and their presence in the case of an intervening mortgagee or other lienor, under the provisions of Section 26 of the National Prohibition Act, is not "significant" in the sense that it deprives the former of all or any rights to relief and grants such rights to the latter class. As we have said, a return of the vehicle to the "owner" is as full relief as he may expect, and pursuing such course is beset with no complications. The intervening owner already is clothed with title, and when the vehicle is returned to him he receives only that which he already owns.

Such is not the situation of the intervening lienor. It may be true that a chattel mortgagee, upon breach of terms of the mortgage by the mortgagor, may take possession of the mortgaged property, but this

is only for the purpose of better preserving his security.

Taking possession of the property does not vest title in the mortgagee. There remains still the interest of the mortgagor, which must be extinguished by foreclosure before the mortgagee can acquire title to the property as "owner".

Manifestly then, the Court could not, in an intervention by a mortgagee or other lienor under the provisions of Section 26, order the seized vehicle turned over to the intervenor. He has no title to it—*he is not the owner*—and he has but an interest in the property as security for the payment of the amount due him. To realize that amount the property may be sold. At the sale the mortgagee may buy it in for the amount of his claim and thus acquire title, but the sale must be had.

The framers of the National Prohibition Act substituted a sale of the mortgaged vehicle under procedure prescribed by the Act for foreclosure proceedings in accordance with State laws and the provisions of the mortgage. The reason is easily found. If a surplus remains out of the proceeds of the sale, after all *bona fide* liens have been paid, that surplus represents the defendant's interest in the property, which interest is confiscated by the Government.

In the case of *United States vs. Sylvester, supra*, the Court states the following conclusion respect-

ing the interpretation of Section 26 of the National Prohibition Act.

“Fourth—A *bona fide* vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his *bona fide* lien, as far as possible.”

The Court classes the vendor with the mortgagee, both as lienors, for the reason, expressed elsewhere in the decision, that:

“Seventh—In the fourth instance, after the *bona fide* lien and lack of notice or knowledge have been established, the vehicle should be sold at public auction, and after the costs, as provided by law, have been paid, the United States Marshal shall then pay, if possible, the amount of the *bona fide* lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States.

“(5) To grant this petition (a petition by a conditional sales vendor for return of a truck) would permit a lienor or mortgagee to profit by the transactions, and that result was never intended by the framers of the law. Cases may arise where the application of this rule would result in realizing an insufficient amount at the sale to pay the full amount of the *bona fide* lien; but where a substantial amount has already been paid, as here, on a new truck, undoubtedly the full amount of the balance due, plus the

costs, will be realized, so that the lienor will be fully protected.

“(6) Where, however, the amount paid by the purchaser is small in proportion to the purchase price, so that a large amount will have to be realized by the United States Marshal at the sale, and where the highest bid is insufficient to meet the costs and the amount of the *bona fide* lien, the United States Marshal shall then abandon the sale and report the facts to the Court for further instructions.”

We have no inclination to quarrel with the above decision in any respect. The Court is too apparently striving to apply the law justly and to protect the interests of all concerned for us to assume a critical attitude. And the circumstances of the case before the Court perhaps fully warranted all the conclusions reached.

We think, however, that the Court has over-estimated the probability of more than the amount of the lien being realized at the sale.

The value of the automotive vehicles is affected largely by temperamental considerations. This is particularly true of non-commercial vehicles—so-called “pleasure cars”;—a car that has been used is a “*second-hand*” car. No matter for how short a time it has been used, or how slightly it has been used, it is “*second-hand*”, and its value, as compared with a new car, is greatly diminished. Then there is the matter of “Model”. An automobile of 1922

Model is worth much less in 1923 than a Model of that year, although the 1922 Model car may never have been used. Perhaps the decline in value is not in proportion with the drop in that of a woman's hat or gown of last year's "style", but the phenomenon will help us to understand.

When actual use of an automobile is added to age the result in value reduction is startling. More startling yet is the diminution when the usage has been rough.

Those who decide to engage in the illicit liquor traffic are not likely to be gentle persons, and their treatment of things entrusted to them is not calculated to enhance their value.

In practice, what we are most likely to find in cases of this character is that the vehicle seized is dirty, dented, scratched, its outer parts and accessories broken, top in tatters, paint or enamel rubbed off, and not infrequently the engine and other mechanism damaged.

Such a vehicle, at forced sale in the same condition as when seized, will bring very little as a purchase price. It would have to be a very exceptional case where the amount realized would equal the balance due the conditional sales vendor.

On the other hand, if the vehicle is returned to the vendor and by him overhauled and rehabilitated and it is placed on the market for sale in the ordinary course of trade, the vendor may eventually

realize the balance due him—at least he will come nearer to it than he would from any proceeds derived from a Marshal's sale.

Whenever a vehicle is sold by the Marshal for an amount less than sufficient to defray the costs, as provided by law, and the vendor's claim, there is no defendant's interest to confiscate and the Government gains nothing—and in almost every instance the amount realized will be insufficient to meet both the costs and the vendor's claim, *and the vendor is the loser.*

In *United States vs. Brockley*, 266 Fed. 1001—a case where the petitioners for the return of an automobile seized under the provisions of Section 26, National Prohibition Act, showed that they had lent the automobile to the defendant without any knowledge that it was to be used or that the defendant intended to use it for the illegal transportation of liquor—the Court says:

“Whether the property seized shall be confiscated and sold depends upon the facts appearing and whether the facts presented constitute good cause or reason to the contrary is a question addressed to the *judicial sense* and judgment of the Court. This provision in the act is not analogous, as was contended for by the Government's attorney, to that found in Section 3450 of the Revised Statutes (Comp. St. Sec. 6352) under which it has been held that the ignorance of the owner of a vehicle used by a

third person for the removal of goods with the intent to defraud the United States, will not save his property from confiscation. * * * From these cases, as well as from the general provisions of the revenue laws therein construed, it is conclusive that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture absolutely, whether or not good cause appear to the contrary.”

“The admitted facts in this case show ownership and want of knowledge on the part of the vehicle’s owners as to the purpose for which the vehicle was to be employed. *Without any other attending circumstance, this is sufficient to warrant the Court to order its return.* It might be otherwise if, from the reputation of the person intrusted with the vehicle or other circumstances attending his occupation or employment, the inference might arise that the owners had reason to suspect that their property might be used for the purpose it was employed.”

“The construction contended for by the learned representative of the Government would admit of no reason or cause for the return of property used in connection with a violation of the provisions of this statute, if such was intrusted to the violator of the same and used in connection therewith. *This would work greater hardship upon innocent owners of such property than was contemplated by the legislators; otherwise they would not have provided for the return on good cause shown.* (Italics ours.)

“The order formerly entered is vacated, and the property seized, one Hudson touring car No. 632-971, *is to be delivered to the petitioners*, when storage and charges, if any, are paid by the owners.”

In *McDowell vs. United States*, No. 3865, recently decided by this Court, it was held that Section 3450 Revised Statutes, had been repealed by the enactment of the National Prohibition Act, and that the harsh conditions of confiscation provided by Section 3450 no longer applied in a case such as that now at bar.

Notwithstanding this and notwithstanding decisions in Federal Courts of other jurisdictions, showing an inclination to apply the milder and more just provisions of the National Prohibition Act to cases of this nature, the District Court for Arizona and the District Court for the Northern District of California, in this case, have virtually “re-enacted” Section 3450 in all its serenity. We contend that in so doing the said Courts have gone far beyond their authority.

It will be seen that in interpretation the Court in the Sylvester case was in accord with the Brockley case—only in the disposition of the vehicle do they differ. In fact, they do not differ so much even in that respect, for it may be fairly implied that in a case which would appear proper to the District Court for Connecticut it would return the vehicle to the owner instead of ordering it sold and the

owner's claim paid from the proceeds of the sale. They are one, however, on the proposition that an owner who voluntarily parts with possession of his property, which is afterward without his knowledge used for the illegal transportation of liquor, has a right to protection, and that his vehicle cannot be confiscated upon good cause being shown.

As we have already indicated, we think that a return of the vehicle to the owner, in such circumstances, is the course most likely to promote practical justice, and we urge that the practice be approved.

In the Brockley case, the owners were out of possession of the automobile when it was used for the illegal transportation of liquor, because they had *lent* it. We do not think that, for a case such as this, they were in a materially different position from an owner who has parted with possession under a conditional sales contract—only that if any inferences as to innocence and want of knowledge on the part of the owner is to be indulged in, it favors the conditional sales vendor.

One who lends so valuable a chattel as an automobile to another, without pay, must know him fairly well, and there is consequently more reason to suspect that the lender has a more intimate knowledge of the borrower's character and business than could be expected from a conditional sales vendor as to his vendee, and for that reason the equities in favor

of a conditional sales vendor are even greater than those of a lender.

Our view is that the framers of the National Prohibition Act intended to give the Court a free hand in all cases where an "owner" has shown "good cause" to deal with the situation as the circumstances warrant and that, therefore, it is unnecessary to lay down any rigid rule which must be adhered to in every case. We feel that if the Court is satisfied that nothing above the costs and the vendor's claim will be realized by a sale, the Court may return the vehicle to the vendor. If it is apparent that enough will not be realized from such sale to meet these two items, then the Court should order the vehicle returned to the vendor upon his paying the costs. If a case arises where it is likely that more will be realized than the aggregate of costs and the vendor's claim, then the rule laid down in *United States vs. Sylvester* would, no doubt, be the one to follow. The Court is not bound by the provisions of State laws prescribing the status, rights and obligations of parties to conditional sales contracts, in proceedings of this character, but it may look beyond the mere words of the instrument and construe the status of the claimant as a lienor instead of an owner.

CONCLUSION

We earnestly ask for the following conclusions in this case:

1. That there is no provision in the laws of California that renders a decision in this case different from decisions in similar cases in other jurisdictions necessary or proper.

2. That State laws have no governing force in determining the status or the rights of the petitioner in this case.

3. That the District Court has misinterpreted the National Prohibition Act and the rights granted by it to petitioner, when determining this cause.

4. That the District Court in determining this cause has placed a construction upon the National Prohibition Act that is not warranted by its terms and has employed standards of interpretation that are contrary to the rules of interpretation employed by Federal Courts.

5. That as to owners of seized vehicles the Court is vested with discretion as to procedure to attain the objects of the National Prohibition Act in that respect and that it is the object of said Act to protect innocent vendors from loss as far as possible and that Courts should act with that end in view.

And, as a consequence of said conclusions, we respectfully request that this Court annul and overrule the order heretofore made and entered in this cause

by the United States District Court for the Northern District of California, on April 14th, 1923, and that this Court grant the prayer of the petitioner for the return to it of the personal property described in its petition herein; or, if this Court be of the opinion that a return of said property is not the proper relief to be granted the petitioner, then that this Court order that petitioner have a lien upon the proceeds derived from the sale of said property to the amount due under its contract of conditional sale and that said amount be paid to petitioner, after deducting from the amount realized from the sale of said property the costs, as provided by law, and that in the event the remaining sum, after deducting said costs, be not sufficient to pay petitioner's claim in full, then that the whole of said balance, after deducting the costs, as aforesaid, be paid over to the petitioner.

Respectfully submitted

P. R. LUND,

Attorney for Appellant.

San Francisco.....**JUNE**....., 1923.

APPENDIX

In the Southern Division of the United States District Court,
for the Northern District of California.

First Division.

No. 12871.

No. 12188.

No. 12296.

No. 12957.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. O. KILDALL, et al,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACK MODESTI,
Defendant.

ORDER DENYING MOTION**PARTRIDGE, JOHN S.**

In each of the above entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition Law provides: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile * * * and shall arrest any person in charge thereof. The courts upon conviction of the person so arrested, shall order the liquor destroyed and, unless good cause to the contrary is shown by

the owner, shall order a sale by public auction of the property seized, and the officer making the sale * * * shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor.”

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Sylvester*, 275 Fed. 253 allowed a lien for the amount of the unpaid purchase price under what the opinion calls “a conditional bill of sale,” although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit “a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law.”

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshall Montgomery, et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: “It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have the use of a

to suppose Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession.”

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this State that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. Ap. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price.

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company*, 101 Cal. 37; *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony*, 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States No. 3865*, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved

was whether *Section 3450* of the Revised Statutes had been repealed by the provisions of the National Prohibition Act. It was clearly recognized that under *Section 3450*, the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provision of the Revised Statutes was in effect repealed by *Section 26 of the National Prohibition Act*. It is therefore apparent that unless language is found in *Section 26* which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

(Endorsed): Filed April 14, 1923.

WALTER B. MALING, *Clerk*.

By C. W. CALBREATH, *Deputy Clerk*.

United States
Circuit Court of Appeals

For the Ninth Circuit.

JAMES C. DAVIS, Director General of Rail-
roads, as Agent, Pursuant to Section 211,
Transportation Act, 1920,
Plaintiff in Error,

vs.

R. D. ADAMS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

P. H. JOHNSON, Esq.,

Phelan Building, San Francisco, Calif.,

Attorney for Appellant.

Messrs. KEYES & ERSKINE,

Humboldt Bank Building, San Francisco, Calif.,

Attorneys for Appellee.

In the District Court of the United States in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

No. 16701.

JAMES C. DAVIS, Director-General of Railroads,
as Agent, Pursuant to Section 211, Trans-
portation Act, 1920,

Plaintiff,

vs.

R. D. ADAMS,

Defendant.

Complaint.

Now comes the plaintiff in the above and fore-
going entitled action, and complaining of the de-
fendant herein for cause of action alleges:

I.

That on the 28th day of February, 1920, the then
President of the United States, by proclamation,
pursuant to Section 211 of Transportation Act 1920,
duly designated and appointed Walter D. Hines,
the then Director-General of Railroads, or his suc-

cessor in office, either personally or through such divisions, agents, or persons as the latter might appoint, to exercise and perform all and singular the powers and duties conferred or imposed upon the President of the United States by the provision of said Transportation Act of 1920, except the designation of the agent under Section 206 of said Transportation Act, and the said then President of the United States did thereby confirm and continue in the said Walter D. Hines, Director-General of Railroads and his successor in office, all powers and authority heretofore conferred under the Federal Control Act, approved March 21, 1918, except as such powers and authority have been limited in the said Transportation Act, and the said Walter D. Hines, Director-General of Railroads or his successor in office was by the then President of the United States authorized and directed until otherwise provided by proclamation of the President or by Act of Congress to do and perform as fully in all respects as the President is authorized [1*] to do, all and singular the acts and things necessary or proper, in order to carry into effect the provisions of said proclamation, and the unrepealed provision of the said Federal Control Act.

II.

That James C. Davis, Director-General of Railroads, is the successor in office of W. D. Hines, Director-General of Railroads, and is now the duly appointed, qualified and acting agent of the President, pursuant to said proclamation and pursuant

*Page-number appearing at foot of page of original certified Transcript of Record.

to said Section 211 of the Transportation Act of 1920.

III.

That the defendant in the above-entitled action, R. D. Adams, is a resident of the city and county of San Francisco, State of California.

IV.

That during the year 1918 and subsequent to November second of said year, said defendant, R. D. Adams became indebted to the then Director-General of Railroads in the sum of Two Thousand Six Hundred Sixty-two and $23/100$ (2,362.23) Dollars—including war tax—on account of work and labor performed and services rendered at the instance and request of said defendant, R. D. Adams, in transporting shipment of chrome ore by railroad from Clovis in the county of Fresno, State of California, to Coatesville in the county of Chester, State of Pennsylvania; that said sum has not been paid, nor has any part thereof been paid, except the sum of Seven Hundred and Sixty-five (765) Dollars; that there is now due, owing, and unpaid from said defendant, R. D. Adams, to said plaintiff the sum of One Thousand Five Hundred Ninety-seven and $23/100$ (1,597.23) Dollars; that said plaintiff has demanded payment of said defendant R. D. Adams, but said defendant, R. D. Adams has refused and still refuses to pay the same or any part thereof.

And as and for a second, separate and distinct cause of action against said defendant, said plaintiff complains and alleges as follows: [2]

I.

Plaintiff hereby refers to and repeats the allegations of paragraphs I, II, and III, of the first cause of action herein, and by such reference and repetition hereby make said paragraphs I, II, and III, and each of them a part of this second cause of action, with the same force and effect as if the same were at length repeated herein.

II.

That on or about the 2d day of November, 1918, said defendant, R. D. Adams, delivered or caused to be delivered at Clovis in the county of Fresno, State of California, to the then Director-General of Railroads, a shipment of chrome ore, to be transported by railroad from said Clovis in the county of Fresno, State of California, to Coatesville in the county of Chester, State of Pennsylvania; that said shipment of chrome ore was consigned to the order of defendant, R. D. Adams, c/o E. C. Humphreys Company, notify Midvale Steel and Ordinance Company at Coatesville, Pennsylvania; that said shipment of chrome ore was so transported from said Clovis in the county of Fresno, State of California, to said Coatesville by the then Director-General of Railroads, that, pursuant to said bill of lading, the said Midvale Steel and Ordinance Company at Coatesville, Pennsylvania, was at once notified of the arrival of said shipment of chrome ore, and thereupon said Midvale Steel and Ordinance Company refused to accept said shipment of chrome ore; that immediately upon said refusal by said Midvale Steel & Ordinance Company to ac-

cept said shipment of chrome ore, the then Director-General of Railroads notified E. C. Humphrey's Company that said shipment of chrome ore had arrived at Coatesville, but said E. C. Humphrey's Company likewise refused to accept said shipment; that thereafter and in accordance with law said shipment of chrome ore was sold by the Director-General of Railroads, and the proceeds of the sale applied against the accrued charges for such transportation leaving a balance of One Thousand Five Hundred [3] Ninety-seven and $23/100$ (1597.23) Dollars; that the legal charge for such transportation including war tax—was and is the sum of Two Thousand Three Hundred Sixty-two and $23/100$ Dollars has been paid, except the sum of Seven Hundred and Sixty-five (765) Dollars, and there is now due, owing and unpaid from said defendant, R. D. Adams, to said plaintiff the sum of One Thousand Five Hundred and Ninety-seven Dollars and $23/100$ ths (1,597.23).

III.

That said plaintiff has demanded of said defendant, R. D. Adams said sum of One Thousand Five Hundred Ninety-seven and $23/100$ ths Dollars, and said defendant refused and still refuses to pay the same or any part thereof, and the same is now due, owing and unpaid from said defendant to said plaintiff.

WHEREFORE, plaintiff prays judgment against said defendant, R. D. Adams, in the sum of One Thousand Five Hundred Ninety-seven and $23/100$ ths Dollars with interest thereon, at the

rate of seven (7) per cent per annum, from the second day of November, 1918, until paid, and for costs of suit.

Dated, March sixth, 1922.

P. H. JOHNSON,
Attorney for Plaintiff. [4]

State of California,
City and County of
San Francisco,—ss.

P. H. Johnson, being duly sworn, on behalf of the plaintiff in the above-entitled case, says that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information or behalf, and as to those matters, that he believes it to be true; that the said plaintiff is absent from the State of California, where his attorney resides, and that the affiant is plaintiff's attorney, and therefore makes this affidavit for, and on behalf of the said plaintiff.

P. H. JOHNSON.

Subscribed and sworn to before me this 10th day of March, 1922.

[Seal] LESTER BALL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 10, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[5]

(Title of Court and Cause.)

Demurrer.

Now comes the defendant in the above-entitled action and demurs to the complaint on file herein and for grounds of demurrer alleges:

I.

Said complaint does not state facts sufficient to constitute a cause of action.

II.

That the first count of said complaint does not state facts sufficient to constitute a cause of action against the defendant R. D. Adams.

III.

That the first count of said complaint is barred by the terms and provisions of Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

IV.

That the second count of said complaint does not state facts sufficient to constitute a cause of action.

V.

That the second count of said complaint is barred by the terms and provisions of Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

VI.

That said complaint is uncertain in this that it does not appear whether or not a bill of lading for said alleged shipment was issued to said Adams

or to E. C. Humphreys Company or to the Midvale Steel Company, and it does not appear therefrom whether or not there was any bill of lading or agreement in writing entered into by and between said R. D. Adams and said plaintiff for the shipment of said goods and if so what the terms and provisions of said agreement were. [6]

VII.

That said complaint is uncertain in this that it does not appear therefrom how long the chrome ore which was shipped was held by the railroad after refusal of the Midvale Steel Company and E. C. Humphreys Company to accept said shipment, whether or not it was held in the car in which it was shipped or was stored and if so by whose order and at whose request it was stored and it does not appear therefrom how much of said accrued charges for transportation are for demurrage and how much are for storage.

VIII.

That said complaint is unintelligible in the same particulars in which it is claimed to be uncertain in Paragraphs VI and VII hereof.

IX.

That said complaint is ambiguous in the same particulars in which it is claimed to be uncertain in Paragraphs VI and VII hereof.

X.

That the said plaintiff has no legal capacity to sue the said defendant.

XI.

That the Court has no jurisdiction of the person of the defendant or the subject of the action.

WHEREFORE, defendant prays that plaintiff take nothing by his said complaint on file herein, but that this defendant be hence dismissed with his costs of suit expended herein.

KEYES and ERSKINE,
Attorneys for Defendant.

Receipt of a copy of the within demurrer is hereby admitted this 19th day of April, 1922.

P. H. JOHNSON,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 20, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[7]

At a stated term, to wit, the March Term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday the 8th day of May, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,701.

JAMES C. DAVIS, as Agent, etc.

vs.

R. D. ADAMS.

**Minutes of Court—May 8, 1922—Order Overruling
Demurrer.**

Defendant's demurrer to complaint coming on to be heard and after arguments being submitted, it is ordered that said demurrer be and is hereby overruled. [8]

(Title of Court and Cause.)

Answer.

Now comes the defendant, R. D. Adams, and answering plaintiff's complaint on file in the above-entitled action, admits, denies and alleges as follows:

I.

Answering the first count of said complaint this defendant denies that during the year 1918 or at any other time or at all and subsequent to November 2d, 1918, or at any other time or at all the said defendant became indebted to the then Director-General of Railroads in the sum of \$2,662.23 or in the sum of \$2,362.23 or in any sum whatsoever or at all including war tax or excluding war tax on account of work and labor performed or on account of work or labor performed and services rendered or on account of work or labor performed or services rendered at the instance and request of the defendant R. D. Adams or at the instance or request of the defendant R. D. Adams or for or on account of any work or labor or services whatsoever or on account of work or labor or services in transporting a ship-

ment of chrome ore by railroad from Clovis in the county of Fresno, State of California, to Coatesville in the county of Chester, State of Pennsylvania, or for transporting chrome ore or any other product from any place in the State of California or elsewhere to the State of Pennsylvania.

For a further and separate defense to the said first count of said complaint this defendant alleges that the said claim and the said first count of said complaint is barred by the terms and provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

Answering the second count of said complaint this defendant denies that he delivered or caused to be delivered at Clovis in the county of Fresno, State of California, to the Director-General of [9] Railroads on or about the 2d day of November, 1918, a shipment of chrome ore to be transported by railroad from said Clovis in the county of Fresno, State of California, to Coatesville, in the county of Chester, State of Pennsylvania, but on the contrary allege that on September 17th, 1918, said defendant entered into a contract in writing with E. C. Humphreys Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, by which said defendant agreed to sell and deliver to said E. C. Humphreys Company, 1,046 tons of low grade and 608 tons of high grade chrome ore; that a copy of said agreement marked Exhibit "A" is hereto attached, hereby referred to and made a part hereof for all purposes, and that in pursuance of said agreement

and on the 2d day of November, 1918, the said R. D. Adams delivered to the said Director-General of Railroads a quantity of chrome ore amounting to a carload; that said chrome ore was placed by the railroad in Car Erie 51611; that thereupon an order bill of lading was issued by the railroad; that by the terms of said order bill of lading the said ore was consigned to the order of defendant, R. D. Adams, care of E. C. Humphreys Company, Coatesville, Pennsylvania; that it was provided on the said bill of lading that the Midvale Steel & Ordinance Company at Coatesville should be notified; that at the time of the issuance of said bill of lading to the said R. D. Adams the said R. D. Adams did not reside at Coatesville and did not expect delivery of the said chrome ore at Coatesville, Pennsylvania; that the value of said chrome ore at said time of shipment was the sum of \$2,852.13; that after the issuance of said bill of lading the said defendant endorsed the same and delivered it to the said E. C. Humphreys Company who thereupon became the owner and consignee of the said shipment of chrome ore; that the said shipment of chrome ore was destined for and intended for the Midvale Steel & Ordinance Company; that this defendant is informed and believes and therefore alleges that the said E. C. [10] Humphreys Company agreed to sell the said car of ore to said Midvale Steel & Ordinance Company; that the said car of chrome ore arrived at Coatesville, Pennsylvania, and the said Midvale Steel & Ordinance Company was notified of the arrival thereof; that the said Midvale Steel & Ordinance

nance Company refused to accept the said shipment of chrome ore; that thereupon the said E. C. Humphreys Company directed, and requested the Director-General of Railroads to unload the said ore and to store the said chrome ore until it, the said E. C. Humphreys Company could resell it to some other person; that thereupon the said E. C. Humphreys Company for three or four months attempted to resell the said chrome ore to some other person, firm or corporation; that the said Director-General of Railroads in compliance with the said request and demand of the said E. C. Humphreys Company unloaded the said ore and stored the same; that the said defendant did not agree with the said Director-General or anyone else to pay the said freight upon the said ore; that on the contrary the said E. C. Humphreys Company agreed to pay said freight on the said ore; that after the ore had remained in storage as requested by the said E. C. Humphreys Company the said Director-General of Railroads sold the said ore and received from the sale thereof the sum of \$765.00; that the following are the charges that were made by the said Director-General of Railroads for the freight, storage and unloading of the said ore and for demurrage thereon, to wit:

Freight	\$ 873.37
Demurrage, Pennsylvania railroad	90.00
Demurrage “ “	70.00
Storage	1,290.00
Unloading	7.63
<hr/>	
Total	\$2,331.00

That all of said sums were incurred at the special instance and request of the said E. C. Humphreys Company; that the said sum of \$1,290.00 is not the reasonable value for the storage of said ore; that the reasonable value for the storage of said ore could not exceed the sum of \$100.00; that the said ore remained [11] stored at the request of the said E. C. Humphreys Company for three or four months after the arrival thereof at Coatesville, Pa.; that defendant is informed and believes and therefore avers that the said ore was not stored in any warehouse, that it was simply dumped at or near the railroad tracks at Coatesville, Pa., in the open air. Defendant denies that the said E. C. Humphreys Company likewise refused to accept said shipment but on the contrary alleges that the said E. C. Humphreys Company accepted the said shipment and agreed to pay the freight therefor and ordered the ore stored as hereinabove set forth. Denies that the legal charge for the transportation including war tax for said ore is and was the sum of \$2,662.23 or is or was the sum of \$2,362.23 or is any sum in excess of the sum of \$2,662.23. Denies that there is now due, owing and unpaid or that there is now due, owing or unpaid from the said defendant R. D. Adams to the said plaintiff the sum of \$1,597.23 or any sum whatsoever.

For a further and separate defense to the said second count of said complaint this defendant alleges that the said claim and the said second count of said complaint is barred by the terms and provi-

sions of Subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

WHEREFORE, this defendant prays that plaintiff take nothing by his complaint on file herein and that this defendant have judgment herein for his costs of suit.

KEYES & ERSKINE,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

R. D. Adams, being duly sworn, deposes and says:

That he is the defendant named in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as [12] to those matters which are therein stated on information and belief and as to those matters he believes it to be true.

R. D. ADAMS.

Subscribed and sworn to before me this 20th day of May, 1922.

[Seal] NETTIE HAMILTON,
Notary Public in and for the City and County of
San Francisco, State of California. [13]

Exhibit "A."

Detroit, Michigan, September 17, 1918.

Mr. R. D. Adams,
Humboldt Bank Bldg.,
San Francisco, Cal.

Dear Sir:

In accordance with arrangement made with your Mr. W. E. Balcom, it is hereby understood that you are to furnish us the following tonnages and grades of Chrome Ore for shipment as specified, in lieu of tonnages still due us on Purchase Orders Nos. 1307, 1326 and 1363 respectively.

We are to have a total of 1046 tons of low grade Chrome Ore guaranteed 30 to 35% Chromic Oxide
10% and under Silica
all for shipment over the balance of this year at a price of 60¢ per unit per net ton for 30% Ore; 64¢ per unit per net ton for 34% Ore with 2¢ per unit advance over 34% basis. It is understood that we will allow you to ship a few cars as low but not lower than 28% Chromic Oxide at the same price subject to 2¢ per unit decline for each unit under 30%, providing we can get the sanction of our customers. It is understood that you are not to ship any Ore less than 30% unless you hear from us to that effect.

Shipment of the above-mentioned low grade tonnage is to start at once. The first 469 tons is to be shipped to the Colorado Fuel & Iron Company, Minnequa, Colorado. As soon as you have com-

pleted shipment of this quota, we will give you additional shipping specifications.

It is understood that we are to have a total of 608 tons of high grade Ore—that, is, Ore Guaranteed 40 to 45% Chromic Oxide with Silica 8% and under. The price for this Ore is to be \$1.10 per unit for Ore 40% and over Chromic Oxide. This Ore to be shipped to E. J. Lavino & Company, Philadelphia, Pennsylvania. [14]

Shipment of not less than 250 tons of this high grade Ore to be made during the next sixty days and it is understood that if it is possible, you will ship the entire 608 tons this year, but this Agreement gives you the right to delay shipment of all over and above 250 tons until 1919 Spring season.

Terms of payment to be sight draft with bill-lading and analysis certificate attached thru our Detroit Bank, the National Bank of Commerce. These drafts to be subject to a discount of $\frac{1}{2}$ of 1% for prompt payment.

E. C. HUMPHREYS COMPANY,

Per E. C. Humphreys,

Prest.

Accepted.

R. D. ADAMS.

By W. E. Balcom.

Receipt of a copy of the within answer is hereby admitted this — day of May, 1922.

P. H. JOHNSON,

Attorney for Plaintiff.

[Endorsed]: Filed May 23, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

(Title of Court and Cause.)

Motion to Strike Parts from Answer.

Comes now the plaintiff in the above and foregoing entitled action and here moves this honorable Court for an order striking from the answer of defendant on file herein all those certain portions thereof, to wit:

a. On line 21 of page 2 thereof commencing with the word "said" all of the succeeding allegations to and including the word "agreement" on line 28 of page 2 thereof.

b. On line 8 of page 3 thereof commencing with the word "that" all of the succeeding allegations to and including the word "company" on line 21 of page 3 thereof.

c. On line 25 of page 3 thereof commencing with the word "that" all of the succeeding allegations to and including the word "same" on line 4 of page 4 thereof.

d. On line 6 of page 4 thereof commencing with the word "that" all of the succeeding allegations to and including the word "company" on line 9 thereof.

e. On line 19 of page 4 thereof commencing with the word "that" all of the succeeding allegations to and including the word "company" on line 20 of page 4 thereof.

f. On line 22 of page 4 thereof commencing with the word "that" all of the succeeding allegations to and including the word "Pa." on line 26 of page 4 thereof.

g. On line 1 of page 5 thereof commencing with the word "that" all of the succeeding allegations to and including the word "forth" on line 3 of page 4 thereof.

h. All of Exhibit "A" beginning with the words Exhibit "A" on line 1 after page 6 of said complaint down to and including the word "Balcom" on line 18 of page 2 following page 6 of said complaint, and each clause, each phrase and each word set forth [16] in the foregoing specifications and each thereof upon the ground that all the matters hereinbefore set forth and specified as set forth in said answer are, and each clause, phrase and word thereof is, incompetent, irrelevant, immaterial, redundant, evidentiary, argumentative and are conclusions of law and unnecessary matter to be in said answer.

This motion is made and based upon all the papers, pleadings, records and files on file in the above-entitled action and upon that certain notice of motion, dated May 26, 1922, and served and filed in the above and foregoing entitled action on the 27th day of May, 1922.

P. H. JOHNSON,
Attorney for Plaintiff.

JAMES G. GOWEN,
Solicitor, Pennsylvania System.
Of Counsel for Plaintiff.

Due and personal service of the within document is admitted this 27th day of May, 1922.

KEYES & ERSKINE,
Attorneys for Defendant.

[Endorsed]: Filed May 27, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

At a stated term, to wit, the March term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 19th day of June, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable FRANK S. DIETRICH, District Judge for the District of Idaho, designated to hold and holding this Court.

(Title of Cause.)

Minutes of Court—June 19, 1922—Order Denying Motion to Strike Out Parts from Answer.

Plaintiff's motion to strike out parts from answer came on to be heard and after arguments being submitted and fully considered, it is ordered that said motion be and the same is hereby denied. [18]

(Title of Court and Cause.)

Proposed Stipulation of Facts.

It is hereby stipulated by and between the parties to the above and foregoing entitled action as follows, to wit:

I.

At the trial of the above-entitled action every

fact included in the following statement will be deemed to be correct but the admission of every fact so stated into evidence shall be subject to all legal objections as to its relevancy, competency and materiality, and it is hereby understood and agreed that this stipulation is entered into with the express reservation that the statements therein contained shall be subject to all legal objections to their relevancy, competency and materiality

II.

That on November 2, 1918, the defendant herein, by a diversion order, intercepted, while still on the line of the initial carrier, Southern Pacific Company, at Tucson, Arizona, 101,700 pounds of chrome ore loaded on Erie car No. 51611, originally shipped from Clovis, California, by the I. D. Payne Company, consigned to its order notify R. D. Adams, the destination of which shipment was Glen Ferris, West Virginia, and diverted the same to Coatesville, Pennsylvania; that thereupon an order bill of lading covering the shipment by railroad of said ore so loaded in Erie car No. 51611 from initial point of shipment, to wit, Clovis, California to Coatesville, Pennsylvania, was issued by the Southern Pacific Company to said defendant in which the defendant herein is both consignor and order consignee and the Midvale Steel & Ordinance Company the "notify" party; that said defendant executed the appropriate shipping order covering the movement by railroad of said ore so loaded in Erie car No. 51611 as aforesaid from Clovis, California, to Coatesville, Pennsylvania, [19] consigned to the defendant,

with instructions to notify Midvale Steel & Ordinance Company; that a copy of said bill of lading marked Exhibit "A" is hereto attached, hereby referred to and made a part hereof for all purposes;

III.

That upon the arrival of said Erie car No. 51611 at destination, to wit, Coatsville, Pennsylvania, the said car loaded with said chrome ore was placed by the plaintiff upon the premises of the Midvale Steel & Ordinance Company for unloading on December 5, 1918; that on or about December 9, 1918, the said Midvale Steel & Ordinance Company refused to accept delivery of the said shipment of chrome ore.

IV.

That on the 2d day of January, 1918, the United States Railroad Administration wrote to the defendant the following letter:

"United States Railroad Administration Philadelphia.

January 2, 1918.

When replying refer to File No. G-30 Desk 1.
Refusal of chrome ore at Coatesville, a/c Midvale Steel Co.

"Mr. R. D. Adams,
"Humboldt Bank Bldg.,
"San Francisco, Cal.

"Dear Sir:

"On December 9, the Midvale Steel & Ordinance Company, Coatesville, Pa., refused to accept delivery of Erie Car #51611, chrome ore, shipped

from the Pacific Coast, purchased by them from E. C. Humphreys Company, Chicago, Ill.

“I accordingly communicated with E. C. Humphreys Company, requesting that they furnish disposal orders for the [20] car in order that further delay to same might be avoided. They advise me, however, that you were the shipper of same, and that they approached you for disposition.

“I trust you appreciate that delays to equipment of this kind are very serious, and must be prevented as far as possible, and I will thank you to advise by return mail what disposition can be made of this shipment.

“Yours very truly,

“R. R. BLYDENBURGH,
B.”

That in answer to said above-mentioned letter the defendant wrote to the United States Railroad Administration as follows:

“January 8, 1919.

“United States Railroad Administration,

“Broad Street Station,

“Philadelphia, Pa.

“Gentlemen:

“Replying to your letter File No. G-30, Desk 1, in reference to Car Erie 51611, chrome ore shipped by us to the E. C. Humphreys Company, beg to advise that they have purchased this car from us and we have delivered the bill of lading to them. This was an order bill of lading shipment and we cannot at present take up the matter of disposition of the car without the bill of lading.

“For your information will state that we have no place we can dispose of this car outside of the destination it is at present and would suggest that you take the matter up with the E. C. Humphreys Company.

“Yours very truly,

“ADAMS & MALTBY,

“By C. S. Maltby.” [21]

V.

That at the time of the shipment of said Erie Car No. 51611 there existed between the defendant and the E. C. Humphreys Company a contract in writing a copy of which marked Exhibit “B” is hereto attached, hereby referred to and made a part hereof for all purposes; that the shipment by said defendant of Erie Car No. 51611 was made in pursuance of said contract with E. C. Humphreys Company, and the said Erie Car No. 51611 was routed by defendant and sent “c/o E. C. Humphreys Company,” as per order bill of lading, Exhibit “A.”

VI.

That at the time the said contract of transportation was entered into between the plaintiff and defendant herein as evidenced by said order bill of lading hereto attached and marked Exhibit “A,” the plaintiff herein had no knowledge or information of any kind whatever of the contract and arrangement set out in Paragraph V hereinabove, hereto attached and marked Exhibit “B.”

VII.

That at or about the same time the defendant

shipped two other cars known as the Pa. 294001 and Pa. 825285 under said contract with the E. C. Humphreys Company to the Midvale Steel & Ordinance Company, and an order bill of lading was issued for each of said last two mentioned cars; that by the terms of said order bill of lading the said chrome ore contained in each of said cars last named was consigned to the defendant R. D. Adams, c/o E. C. Humphreys Company, Coatesville, Pennsylvania, which was the same method used in respect to Erie Car No. 51611; that it was provided by all of said bills of lading that said Midvale Steel & Ordinance Company at Coatesville, Pennsylvania, should be notified; that at the time when each of these said cars reached the Midvale Steel & Ordinance Company at Coatesville, Pennsylvania, [22] it refused to accept delivery thereof; that after receipt of the letter of January 8, 1919, from Adams & Maltby to the United States Railroad Administration, the said Administration took the matter up with E. C. Humphreys Company therein referred to; that on the 13th day of January, 1919, one Reinhart representing the E. C. Humphreys Company, went to the United States Railroad Administration and asked it to unload and store the chrome ore in Erie Car No. 51611, Pa. car 825285 and Pa. car 294001; that thereupon and at the request of E. C. Humphreys Company the said railroad unloaded the said chrome ore on the ground and on a platform on its right of way at Coatesville, Pennsylvania; that thereafter the E. C. Humphreys Company sold the

two Pennsylvania cars; that at the request of the said E. C. Humphreys Company the two Pennsylvania cars were reloaded by the railroad and in March, 1919, were shipped to the parties designated by the E. C. Humphreys Company; that said E. C. Humphreys Company continued its efforts to sell, at a price satisfactory to said E. C. Humphreys Company, the chrome ore in Erie Car No. 51611 after the disposal of the chrome ore in the two Pennsylvania cars and requested the said railroad to keep said ore in storage pending these efforts.

VIII.

That the said railroad kept the said chrome ore in storage as aforesaid until the 16th day of June, 1919, when in accordance with law and pursuant to the orders of the Railroad Administration the railroad sold the said ore for charges, and received therefor the gross sum of \$765.00.

IX.

That at the time of the shipment of the said chrome ore in Erie Car No. 51611, the Southern Pacific Company issued to the said defendant, R. D. Adams, the said order bill of lading; that the said defendant attached this order bill of lading to a draft [23] on the E. C. Humphreys Company and sent the bill of lading and the draft to the First National Bank of Commerce at Detroit; that the amount of said draft was \$2,325.13; that prior to the arrival of said Erie Car No. 51611 at Coatesville, Pennsylvania, the said E. C. Humphreys Company paid the said draft and received the bill of lading, and on the arrival of said car at

Coatesville, Pennsylvania, directed the disposition thereof.

X.

That the said plaintiff herein had no knowledge or information of any kind whatever of any arrangement between the defendant, R. D. Adams, and the E. C. Humphreys Company, or of the issuance and payment of the draft mentioned and set out in Paragraph IX hereof.

XI.

That the plaintiff herein sold the said shipment of chrome ore, pursuant to law and the orders of the Railroad Administration, after proper and legal notice to the defendant consignor and consignee for the best price it could obtain under all the circumstances, and, therefore, realized the greatest sum available for said chrome ore under all the existing circumstances in connection with said shipment.

XII.

That the charges on this shipment of chrome ore up to the time of placement at the Midvale Plant at Coatesville, Pennsylvania, were as follows:

Demurrage at point of origin	\$12.00		
Diversion at Tucson, Arizona	2.00		
Freight charges at rate of 84.5 cents per 100 pounds, Clovis, Cal., to Coatesville, Pa.	859.37		
	<hr/>	873.37	War tax \$26.20
Against these charges we credit net proceeds of sale, \$758.66, applied	736.38	“ “	22.28
	<hr/>	136.99	“ “ 3.92
Leaving unpaid balance of			

Additional charges accrued are:

	at Coatesville	130.00	War tax	3.90
PRR	“ “ “	110.00	“ “	3.30
PRR unloading	“ “	7.63	“ “	.23
PRR storage	“ “	1290.00	“ “	
Total to be collected,		<hr/>		<hr/>
	\$1,685.97.	\$1674.62	“ “	\$11.35

XIII.

That under the provisions of the published storage Tariff Schedules, shipments unloaded by the carrier to release equipment were charged storage at same rates as would have accrued under demurrage rules had the goods remained in the car; that the reasonable rate to be charged, and the only rate which could have been charged for the storage of said chrome ore, was the rate fixed by the provisions of the published Tariff, to wit, \$10.00 per day, exclusive of Sundays and holidays.

XIV.

That all of the charges mentioned herein, to wit, freight diversion, demurrage, storage and unloading are assessed and computed under appropriate Tariff schedules published and filed by the plaintiff with the Interstate Commerce Commission as provided by law, and that they are in all respects legal and proper.

XV.

That R. D. Adams has not paid any of said charges, including freight, diversion demurrage, storage and unloading of said shipment of chrome ore.

XVI.

That at the time the said bill of lading herein referred to was issued to the said defendant, he did not reside at Coatesville, Pennsylvania; that said defendant did not accept delivery of said chrome ore at Coatesville, Pennsylvania.

XVII.

That the said bill of lading so as aforesaid issued by the Southern Pacific Company to R. D. Adams, defendant consignor and consignee, shows upon its face that said shipment of chrome ore [25] to Coatesville, Pennsylvania, was made at the request of the defendant, R. D. Adams; that the "notify" party, Midvale Steel & Ordinance Company, refused to accept the said shipment of chrome ore upon its arrival at Coatesville, Pennsylvania.

Dated: December 13th, 1922.

P. H. JOHNSON,

Attorney for Plaintiff.

KEYES and ERSKINE,

Attorneys for Defendant.

JAMES E. GOWEN,

Of Counsel for Plaintiff.

[Endorsed]: Filed Feb. 28, 1923. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[26]

(Title of Court and Cause.)

Amended Complaint.

Now comes the plaintiff in the above and forego-

ing entitled action and by leave of Court first had and obtained files this his amended complaint, and complaining of the defendant herein for cause of action alleges:

I.

That on the 28th day of February, 1920, the then President of the United States, by proclamation, pursuant to Section 211 of Transportation Act 1920, duly designated and appointed Walter D. Hines, the then Director-General of Railroads, or his successor in office, either personally or through such divisions, agents or other persons as the latter might appoint, to exercise and perform all and singular the powers and duties conferred or imposed upon the President of the United States by the provision of said Transportation Act of 1920, except the designation of the agent under Section 206 of said Transportation Act, and the said then President of the United States did thereby confirm and continue in the said Walter D. Hines, Director-General of Railroads and his successor in office, all powers and authority heretofore conferred under the Federal Control Act, approved March 21, 1918, except as such powers and authority have been limited in the said Transportation Act, and the said Walter D. Hines, Director-General of Railroads or his successor in office was by the then President of the United States authorized and directed until otherwise provided by proclamation of the President or by Act of Congress to do and perform as fully in all respects as the President is authorized to do, all and singu-

lar the acts and things necessary or proper, in order to carry into effect the provisions of said proclamation, and the unrepealed provisions of the said Federal Control Act. [27]

II.

That James C. Davis, Director-General of Railroads, is the successor in office of W. D. Hines, Director-General of Railroads, and is now the duly appointed, qualified and acting agent of the President, pursuant to said proclamation and pursuant to said Section 211 of the Transportation Act of 1920.

III.

That the defendant in the above-entitled action, R. D. Adams, is a resident of the city and county of San Francisco, State of California.

IV.

That during the year 1918 and subsequent to November 2d of said year, said defendant, R. D. Adams became indebted to the then Director-General of Railroads in the sum of Two Thousand Four Hundred Forty-four and 63/100 (\$2,444.63) Dollars—including war tax, on account of work and labor performed and services rendered at the instance and request of said defendant, R. D. Adams, in transporting shipment of chrome ore by railroad from Clovis in the county of Fresno, State of California, to Coatesville in the county of Chester, State of Pennsylvania; that said sum has not been paid, nor has not been paid, nor has any part thereof been paid; except the sum of Seven Hundred Fifty-eight and 66/100 (758.66)

Dollars; that there is now due, owing and unpaid from said defendant, R. D. Adams, to said plaintiff the sum of One Thousand Six Hundred Eighty-five and 97/100 (1,685.97) Dollars; that said plaintiff has demanded payment of said defendant, R. D. Adams, but said defendant, R. D. Adams has refused and still refuses to pay the same or any part thereof.

As and for a second, separate and distinct cause of action against said defendant, said plaintiff complains and alleges as follows:

I.

Plaintiff hereby refers to and repeats the allegations of [28] paragraphs I, II, and III of the first cause of action herein and by such reference and repetition hereby made said paragraphs I, II and III, and each of them, a part of this second cause of action, with the same force and effect as if the same were at length repeated herein.

II.

That on or about the 2d day of November, 1918, said defendant, R. D. Adams, delivered or caused to be delivered at Clovis, in the county of Fresno, State of California, to the then Director-General of Railroads, a shipment of chrome ore, to be transported by railroad from said Clovis, in the county of Fresno, State of California, to Coatesville, in the county of Chester, State of Pennsylvania; that said shipment of chrome ore was consigned to the order of defendant, R. D. Adams, c/o E. C. Humphrey's Company, notify Midvale Steel and Ordnance Company at Coatesville, Pennsylvania; that

said shipment of chrome ore was so transported from said Clovis in the county of Fresno, State of California, to said Coatesville by the then Director-General of Railroads; that, pursuant to said bill of lading, the said Midvale Steel and Ordinance Company at Coatesville, Pennsylvania, was at once notified of the arrival of the said shipment of chrome ore, and thereupon said Midvale Steel and Ordinance Company refused to accept said shipment of chrome ore; that immediately upon said refusal by said Midvale Steel and Ordinance Company to accept said shipment of chrome ore, the then Director-General of Railroads notified E. C. Humphrey's Company that said shipment of chrome ore had arrived at Coatesville, but said E. C. Humphrey's Company likewise refused to accept said shipment; that thereafter and in accordance with law said shipment of chrome ore was sold by the Director-General of Railroads, and the proceeds of the sale applied against the accrued charges for such transportation leaving a balance of One Thousand Six Hundred Eighty-five and $97/100$ (1,685.97) Dollars; that the legal charge for such transportation, including war tax, was and is the sum of [29] Two Thousand Four Hundred Forty-four and $63/100$ (2,444.63) Dollars; that no part of said sum of Two Thousand Four Hundred Forty-four and $63/100$ (2,444.63) Dollars has been paid, except the sum of Seven Hundred Fifty-eight and $66/100$ (758.66) Dollars, and there is now due, owing and unpaid from said defendant, R. D. Adams, to said plaintiff the sum

of One Thousand Six Hundred Eighty-five and 97/100 (1,685.97) Dollars.

III.

That said plaintiff has demanded of said defendant, R. D. Adams, said sum of One Thousand Six Hundred Eighty-five and 97/100 (1,685.97) Dollars and said defendant refused and still refuses to pay the same or any part thereof, and the same is now due, owing and unpaid from said defendant to said plaintiff.

WHEREFORE, plaintiff prays judgment against said defendant, R. D. Adams, in the sum of One Thousand Six Hundred Eighty-five and 97/100 (1,685.97) Dollars with interest thereon, at the rate of seven per cent per annum, from the second day of November, 1918, until paid, and for costs of suit.

Dated: March 13th, 1923.

P. H. JOHNSON,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

P. H. Johnson, being duly sworn, on behalf of the plaintiff, in the above-entitled case, says that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters that are therein stated on information or belief, and as to those matters, that he believes it to be true.

That the said plaintiff is absent from the State of California, where his attorney resides, and that

the affiant is plaintiff's attorney and, therefore, makes this affidavit on [30] behalf of the said plaintiff.

P. H. JOHNSON.

Subscribed and sworn to before me this 13th day of March, A. D. 1923.

[Seal] EDWIN G. BATH,
Notary Public in and for the City and County of
San Francisco, State of California.

Due service and receipt of copy of the within document is hereby admitted, this 13th day of March, 1923.

KEYES and ERSKINE,
Attorneys for Defendant.

[Endorsed]: Filed Mch. 14, 1923. Walter B. Maling, Clerk. [31]

(Title of Court and Cause.)

Supplemental Stipulation of Facts.

It is hereby stipulated by and between the parties to the above-entitled action as follows, to wit:

I.

That Paragraph XIII on page 7 of the stipulation of facts filed in this case may be amended so that said paragraph will read as follows:

“That under the provisions of the published storage Tariff Schedules, shipments unloaded by the carrier to release equipment were charged storage at same rates as would have accrued under demurrage rules had the goods remained in the

car; that the reasonable rate to be charged, and the only rate which could have been charged for the storage of said chrome ore, was the rate fixed by the provisions of the published Tariff, to wit: Charges applicable after free time, forty-eight hours, has expired, for each of the first four days \$3.00, for each of the next three days \$6.00 and for each succeeding day \$10.00.”

II.

The Federal Order No. 34 A effective at the time of the arrival of this freight read, with reference to unperishable freight, in part as follows:

“Carriers subject to Federal control shall sell at public auction to the highest bidder without advertisement carload and less than carload non-perishable freight which has been refused or is unclaimed at its destination by consignee *after the same has been on hand sixty days*. Consignee, as described in the waybilling, shall be notified of arrival of shipment in all cases and such notice shall contain a provision that if freight is unclaimed or undelivered for fifteen days after expiration of free time at destination it will be treated as refused and may be sold without further notice sixty [32] days *from date of arrival*.”

III.

The Pennsylvania statute applicable to the sale of freight which has not been taken by the owner or consignee and which statute was in effect at the time is known as “No. 965, An Act Relating to the liens of common carriers, and others.” A copy

of said Act marked Exhibit "C" is hereto attached and made a part hereof for all purposes.

IV.

It is further stipulated that R. D. Adams, defendant herein, did not give any direct personal notice to the plaintiff or to the Pennsylvania Railroad to store the shipment in Car Erie 51611, and it is further stipulated that said R. D. Adams at all the times herein mentioned, steadfastly refused to give or make any disposition order of said car Erie 51611 to plaintiff or to the Pennsylvania Railroad.

V.

It is further stipulated that the admission of every fact herein stated shall be subject to all legal objections as to its relevancy, competency and materiality.

Dated: March 16, 1923.

P. H. JOHNSON,
Attorney for Plaintiff.
KEYES and ERSKINE,
Attorneys for Defendant. [33]

Exhibit "C."

No. 965.

AN ACT.

Relating to the liens of common carriers, and others.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth

of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same. That in all cases, in which commission merchants, factors, and all common carriers, or other persons, shall have a lien, under existing laws, upon any goods, wares, merchandise, or other property, for, or on account of, the costs, or expenses, of carriage, storage, or labor bestowed on such goods, wares, merchandise, or other property, if the owner, or the consignee of the same, shall fail, or neglect, or refuse to pay the amount of charges upon any such property, goods, wares, or merchandise, within sixty days after demand thereof, made personally, upon such owner, or consignee, then, and in such case, it shall and may be lawful for any such commission merchant, factor, common carrier, or other person, having such lien, as aforesaid, after the expiration of said period of sixty days, to expose such goods, wares, merchandise, or other property, to sale, at public auction, and to sell the same, or so much thereof, as shall be sufficient to discharge said lien, together with costs of sale and advertising: **PROVIDED**, That notice of such sale, together with the name of the person, or persons, to whom such goods shall have been consigned, shall have been first published for three consecutive weeks, in a newspaper, published in the county, and by six written, or printed handbills, put up in the most public and conspicuous places in the vicinity of the depot where the said goods may be.

Section 2. That upon the application of any of the persons, or corporations, having a lien upon goods, wares, merchandise, or other property, as mentioned in the first section of this act, verified by affidavit, to any of the judges of the courts of common pleas of this commonwealth, setting forth that the places of residence of the [34] owner and consignee of any such goods, wares, merchandise, or other property, are unknown, or that such goods, wares, merchandise, or other property, are of such perishable nature, or so damaged, or showing any other cause that shall render it impracticable to give the notice as provided for in the first section of this act, then, and in such case, it shall and may be lawful for a judge of the city, or county, in which the goods may be, to make an order, to be by him signed, authorizing the sale of such goods, wares, merchandise, or other property, upon such terms, as to notice, as the nature of the case may admit of, and to such judge shall seem meet: PROVIDED, That in cases of perishable property, the affidavit and proceedings, required by this section, may be had before a justice of the peace.

Section 3. That the residue of moneys, arising from any such sale, either under the first or second sections of this act, after deducting the amount of the lien, as aforesaid, together with costs of advertising and sales, shall be held subject to the order of the owner, or owners, of such property.

Section 4. That an act of the general assembly, entitled "An Act in reference to liens of common

carriers, and others," approved the sixteenth day of March, Anno Domini one thousand eight hundred and fifty-eight, be and the same is hereby repealed.

JOHN CESSNA,

Speaker of the House of Representatives.

GEORGE V. LAWRENCE,

Speaker of the Senate.

Approved: The fourteenth day of December, Anno Domini one thousand eight hundred and sixty-three.

A. G. CURTIS.

[Endorsed]: Filed Mar. 17, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[35]

(Title of Court and Cause.)

(Decision on the Merits.)

Upon the agreed statement of facts the Court concludes that plaintiff is entitled to recover of and from the defendant the charges set out in said statement to and including Jan. 8, 1919. It is assumed the parties can segregate the proper items for entry in the judgment, rendered accordingly. Who ships goods as principal contracts to pay freight whether or not owner or consignee, in absence of agreement to the contrary.

Demurrage and storage after carriage completed is implied rather than express and arises only incidentally, viz., by the consignee's default promptly to receive delivery of the goods, the carrier's duty

to preserve them for reasonable time, and the latter's right to be compensated for this latter service. The obligation for this compensation ordinarily falls upon the delinquent consignee whose fault occasioned the service and whose is the benefit. In this case wherein defendant was both consignor and consignee, he is at least liable for the demurrage and storage until he parted with ownership and control of the ore and bill of lading by sale and transfer of both the Humphreys and gave notice thereof to plaintiff.

Thereafter, as both further default in receipt of delivery and further benefit of storage were not defendants' but were Humphreys' to plaintiff's knowledge and in which he acquiesced (accepted the situation and submitted to Humphreys' control and direction) not defendant but Humphreys is obligated to compensate plaintiff; and from the latter alone can plaintiff recover. The rule is that of any ordinary bailment of storage other than following carriage, in like circumstances.

If the bailor sells and notifies the bailee, any further service by the latter is in reliance upon the implied duty of the [36] vendee to pay for it. If plaintiff was not content, he could have refused further storage despite order 34a.

March 20, 1923.

BOURQUIN,
J.

[Endorsed]: Filed Mch. 20, 1923. Walter B. Maling, Clerk. [37]

At a stated term, to wit, the March Term, 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Tuesday the 20th day of March in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

(Title of Cause.)

Minutes of Court—March 20, 1923—Order for Judgment.

This cause heretofore submitted being now fully considered and the Court having filed its decision, it is ordered that judgment be entered in favor of plaintiff in the sum of \$518.31 and for costs. [38]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial upon the 13th day of March, 1923, being a day in the March, 1923, term of said court, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed; P. H. Johnson, Esq., appearing as attorney for plaintiff and Messrs. Keyes and Erskine, appear-

ing as attorneys for defendant and the cause having been submitted to the Court on an agreed statement of facts and the briefs of the attorneys, and the Court after due deliberation having rendered its oral opinion and ordered that judgment be entered in favor of the plaintiff and against defendant in the sum of \$518.31 and for costs.

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff do have and recover of and from defendant the sum of Five Hundred Eighteen and 31/100 (\$518.31) Dollars, together with his costs herein expended taxed at \$14.00.

Judgment entered March 20, 1923.

WALTER B. MALING,

Clerk. [39]

(Title of Court and Cause.)

Petition for Writ of Error.

The above-named plaintiff, James C. Davis, Director-General of Railroads, as agent, pursuant to Section 211, Transportation Act, 1920, feeling himself aggrieved by the decision of the above-entitled Court rendered in said cause, and the judgment entered thereon, on the 20th day of March, 1923, comes now, by P. H. Johnson, his attorney, and James E. Gowen, of counsel for plaintiff, to petition said Court for an order allowing him to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit under and according to the laws of the United

States in that behalf made and provided, for the reasons specified in his assignment of errors filed herewith.

The judgment, above referred to and which this plaintiff desires to have reviewed by writ of error as aforesaid, adjudged that this plaintiff is entitled to recover of and from the defendant the charges for storage set out in the agreed statement of facts filed in said cause, to and including January 8, 1919, to wit, the sum of \$518.31 and his costs and disbursements incurred in said cause amounting to the sum of \$14.00; and denied the prayer of plaintiff's complaint for the item of storage, to wit, \$758.66, accruing subsequent to January 8, 1919, and that plaintiff must look to a third party for the latter amount.

WHEREFORE, plaintiff prays that this Honorable Court make and enter an order allowing such writ of error and fixing the amount of security to be required of plaintiff to perfect these proceedings in error, and further prays that a transcript of the record, proceedings and papers upon which said decision and judgment was made and entered, as aforesaid, duly authenticated, may be sent to said Circuit Court of Appeals in and for the Ninth Circuit, [40] sitting at San Francisco, California.

Dated: April 4th, 1923.

P. H. JOHNSON,
Attorney for Plaintiff.

JAMES E. GOWEN,
Of Counsel for Plaintiff.

[Endorsed]: Filed Apr. 12, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [41]

(Title of Court and Cause.)

Assignment of Errors.

Comes now the plaintiff in the above and foregoing entitled and numbered action, and files the following assignment of errors upon which he will rely on his prosecution of the writ of error in the above-entitled cause.

I.

That the said United States District Court in and for the Northern District of California, erred in denying the motion of the plaintiff and plaintiff in error to strike out portions of the original answer filed by the defendant in said cause of action.

II.

That the said United States District Court in and for the Northern District of California, erred in rendering its decision in favor of defendant and defendant in error and against the plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action.

III.

That the said United States District Court in and for the Northern District of California, erred in rendering its decision in favor of defendant and defendant in error and against the plaintiff and plaintiff in error for charges for storage subse-

quent to January 8, 1919, as set out in the agreed statement of facts filed in said action, and in entering judgment in accordance therewith.

IV.

That the said United States District Court in and for the Northern District of California, erred in rendering its decision and entering its judgment thereon in favor of defendant and [42] defendant in error and against plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action in this: That said decision is against law.

V.

That the said United States District Court in and for the Northern District of California, erred in rendering its decision and entering its judgment thereon in favor of defendant and defendant in error and against plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action, in this: That said decision and said judgment is against law.

VI.

That the said United States District Court in and for the Northern District of California, erred in holding that plaintiff had knowledge of the sale and passing of title to Humphreys Company at the time of the transactions out of which the plaintiff's claim arose.

VII.

That the said United States District Court in and

for the Northern District of California, erred in holding that Humphreys took any orders from Adams, except as agent for Adams.

VIII.

That the said United States District Court in and for the Northern District of California, erred in holding that Humphreys Company, and not defendant, was obligated to plaintiff for the storage of said chrome ore after January 8, 1919.

IX.

That the said United States District Court in and for the Northern District of California, erred in holding that defendant, Adams, was entitled to and should receive the proceeds of the sale of said chrome ore, when Humphreys Company was the owner at the time of sale. [43]

X.

That the said United States District Court, in and for the Northern District of California, erred in assuming that plaintiff was dealing with Humphreys Company otherwise than as the agent for defendant, Adams.

XI.

That the said United States District Court, in and for the Northern District of California, erred in holding that the plaintiff and plaintiff in error had notice of the sale of the said chrome ore to Humphreys Company at the time of the transactions out of which the plaintiff's claim arose.

XII.

That the said United States District Court, in and for the Northern District of California, erred

in holding that the liability of the shipper for the lawful charges accruing in this case arose out of considerations of ownership and not out of the request for the service.

XIII.

That the said United States District Court, in and for the Northern District of California, erred in considering the question of ownership of the said chrome ore, raised by the defendant and defendant in error, in making its decision in said action; and that upon the evidence and record herein, the said Courts should have rendered its decision in favor of the plaintiff and plaintiff in error in accordance with the prayer of the complaint in said action, and against the defendant and defendant in error.

WHEREFORE, the said plaintiff and plaintiff in error prays that the judgment of the District Court of the United States, in and for the Northern District of California, Second Division, be reversed and that said cause may be remanded to said United States District Court in and for the Northern District of California, Second Division, with instructions to said Court to enter judgment, in accordance with the prayer of said [44] complaint, for the plaintiff and plaintiff in error.

Dated April 9th, 1923.

P. H. JOHNSON,
Attorney for Plaintiff.

JAMES E. GOWEN,
Of Counsel for Plaintiff.

[Endorsed]: Filed Apr. 12, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[45]

(Title of Court and Cause.)

Order Allowing Writ of Error and Fixing Amount of Bond.

On motion of P. H. Johnson, attorney, and James E. Gowen, of counsel for plaintiff and plaintiff in error, and upon the filing of a petition for a writ of error and an assignment of errors:

IT IS ORDERED that the writ of error as prayed for in said petition be allowed and that the amount of the bond for costs to be given by said plaintiff and plaintiff in error upon said writ of error be, and the same is hereby, fixed at the sum of Two Hundred and Fifty Dollars (\$250) and that on the giving of said bond, conditioned according to law, all further proceedings in this Court shall be suspended pending the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit, sitting at San Francisco, California.

Dated: April 12, 1923.

BOURQUIN,
District Judge.

[Endorsed]: Filed Apr. 12, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[46]

(Title of Court and Cause.)

Bond on Writ of Error for Costs.

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Aetna Casualty & Surety Co., of Hartford, Connecticut, is held and firmly bound unto the above-named R. D. Adams in the sum of Two Hundred and Fifty Dollars (\$250) to be paid to the said R. D. Adams, for the payment of which well and truly to be made, it binds itself, its executors, administrators and assigns firmly by these presents.

Sealed with its seal and dated the 29th day of April in the year of our Lord One Thousand Nine Hundred and Twenty-three.

WHEREAS, the above-named, James C. Davis, Director-General of Railroads, as agent, pursuant to Section 211, Transportation Act, 1920, has sued out a writ of error to the Circuit Court of Appeals of the United States, for the Ninth Circuit to reverse the judgment rendered in the above-entitled suit by the Judge of the District Court of the United States for the Northern District of California, Second Division:

NOW, THEREFORE, the condition of this obligation is such that if the said above-named, James C. Davis, shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good,

then the above obligation to be void; otherwise the same shall be and remain in full force and virtue.

AETNA CASUALTY & SURETY CO.

By S. M. Hayward,
Resident Vice-president.

Attest: [Seal] P. M. CHRISTENSON,
Resident Asst. Secretary.

Form of bond and sufficiency of surety approved.

BOURQUIN,

Judge.

The premium charged for this bond is \$10.00 Dollars per annum.

[Endorsed]: Filed Apr. 12, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[47]

(Title of Court and Cause.)

Praeceptum for Transcript of Record.

To Walter B. Maling, Clerk of the United States District Court, Northern District of California:

Please prepare and duly certify, for the proceedings in error of plaintiff, James C. Davis, Director-General of Railroads, as agent, Pursuant to Section 211, Transportation Act, 1920, to the United States Circuit Court of Appeals for the Ninth Circuit, against the judgment in the above-entitled and numbered suit in favor of the defendant and against said plaintiff, made and entered on the 20th day of March, 1923, a transcript incorporating the following portions of the record herein:

RECORD ON APPEAL.

1. Original complaint filed by plaintiff in said cause.
2. Demurrer to complaint filed by defendant herein.
3. Order overruling defendant's demurrer to plaintiff's complaint.
4. Answer of defendant filed herein.
5. Motion filed by plaintiff to strike parts from original answer of defendant.
6. Order denying motion to strike parts from answer.
7. Proposed stipulation of facts filed herein.
8. Amended complaint filed by plaintiff, pursuant to stipulation.
9. Supplemental stipulation of facts.
10. Written opinion of Court.
11. Order for judgment.
12. Judgment entered thereon. [48]
13. Petition for allowance of writ of error.
14. Order of allowance of writ of error.
15. Assignment of errors.
16. Writ of error.
17. Citation on writ of error.
18. Bond for costs on proceedings in error.
19. This praecipe.

Dated: April 6th, 1923.

P. H. JOHNSON,
Attorney for Plaintiff.

JAMES E. GOWEN,
Of Counsel for Plaintiff.

[Endorsed]: Filed Apr. 12, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [49]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing forty-nine (49) pages, numbered from 1 to 49, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$20.95; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of May, A. D. 1923.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [50]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, Second Division.

No. 16701.

JAMES C. DAVIS, Director-General of Railroads,
as Agent, Pursuant to Section 211, Transportation Act, 1920,

Plaintiff,

vs.

R. D. ADAMS,

Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between James C. Davis, Director-General of Railroads, as agent, pursuant to Section 211, Transportation Act, 1920, plaintiff in error, and R. D. Adams, defendant in error, a manifest error hath happened, to the great damage of the said James C. Davis, Director-General of Railroads, as agent, pursuant to Section 211, Transportation Act, 1920, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy jus-

tice done to the parties aforesaid in this behalf, do command you, if judgment be therein [51] given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 12th day of April, in the year of our Lord one Thousand, Nine Hundred and Twenty-three.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

Allowed by BOURQUIN,
United States District Judge.

Admission of Service.

Service of the foregoing writ of error and receipt of a copy thereof, at the city and county of San Francisco in the Northern District of California, is hereby admitted this 20th day of April, 1923.

KEYES & ERSKINE,
Attorneys for Defendant in Error. [52]

[Endorsed]: No. 16701. In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division. James C. Davis, etc. Plaintiff, vs. R. D. Adams, Defendant. Writ of Error. Filed Apr. 20, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [53]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

No. 16701.

JAMES C. DAVIS, Director-General of Railroads,
as Agent, Pursuant to Section 211, Transportation Act, 1920,

Plaintiff,

vs.

R. D. ADAMS,

Defendant.

Citation on Writ of Error (Original).

United States of America,—ss.

The President of the United States, to R. D. Adams, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's office of the United States District Court for the Northern District of California, Second Division, wherein, James C. Davis, Director-General of Railroads, as agent, pursuant to Section 211, Transportation Act, 1920, is plaintiff in error, and you are defendant in error, to show cause, if any there be why the judgment rendered against the said plaintiff in error, as in the said writ of

error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [54]

WITNESS, the Honorable GEORGE M. BOURQUIN, United States District Judge for the Northern District of California, this 10th day of April, A. D. 1923.

BOURQUIN,
United States District Judge.

Admission of Service.

Service of the foregoing citation on Writ of error, and receipt of a copy thereof, at the city and county of San Francisco, in the Northern District of California, is hereby admitted, this 17th day of April, 1923.

KEYES & ERSKINE,
Attorneys for Defendant in Error. [55]

[Endorsed]: No. 16701. In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division. James C. Davis, etc., Plaintiff, vs. R. D. Adams, Defendant. Citation on Writ of Error. Filed Apr. 20, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 4028. United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Director-General of Railroads, as Agent, Pursuant to Section 211, Transportation Act, 1920, Plaintiff in Error, vs. R. D. Adams, Defendant in

Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed May 9, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, Director General of Railroads, as Agent, pursuant to Section 211, Transportation Act, 1920,

Plaintiff in Error,

VS.

R. D. ADAMS,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the United States Circuit Court of Appeals,
for the Ninth Circuit.

P. H. JOHNSON,

Attorney for Plaintiff in Error.

JAMES E. GOWEN,
Of Counsel.

No. 4028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, Director General of Railroads, as Agent, pursuant to Section 211, Transportation Act, 1920,

Plaintiff in Error,

VS.

R. D. ADAMS,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Upon Writ of Error to the United States Circuit Court of Appeals,
for the Ninth Circuit.

Statement of the Case.

1. INTRODUCTION.

On the 28th day of February, 1920, the President of the United States by proclamation, pursuant to Section 211 of Transportation Act of 1920, duly designated and appointed the Director General of Railroads, or his successor in office, either personally or through such divisions, agents or other persons as the latter might appoint, to exercise and perform all and singular the powers and duties conferred or imposed upon the President of the United

States by the provisions of said Transportation Act of 1920, except the designation of the agent under Section 206 of said Transportation Act, and the President of the United States did thereby confirm and continue in the Director General of Railroads, and his successor in office, all powers and authority heretofore conferred under the Federal Control Act, approved March 21, 1918, except as such powers and authority have been limited in the said Transportation Act, and the Director General of Railroads, or his successor in office, was by the President of the United States authorized and directed, until otherwise provided by proclamation of the President or by Act of Congress, to do and perform as fully in all respects as the President is authorized to do, all and singular the acts and things necessary or proper in order to carry into effect the provisions of said proclamation and the unrepealed provisions of said Federal Control Act.

That, during all the times mentioned in all of the pleadings, papers and files in this action and during all of the times covered by this litigation, the Director General of Railroads was the duly appointed, qualified and acting agent of the President, pursuant to said proclamation and pursuant to said Section 211 of the Transportation Act of 1920.

In view of the admitted facts hereinafter immediately following this introduction, it is deemed unnecessary here to make a detailed statement of the facts of this case and for the sake of brevity

and convenience any further reference, other than to the admitted facts hereinafter set out, will be omitted.

2. THE ADMITTED FACTS.

On November 2, 1918, the defendant herein, by a diversion order, intercepted, while still on the line of the initial carrier, Southern Pacific Company, at Tucson, Arizona, 101,700 pounds of chrome ore loaded on Erie car No. 51611, originally shipped from Clovis, California, by the I. D. Payne Company, consigned to its order notify R. D. Adams, the destination of which shipment was Glen Ferris, West Virginia, and diverted the same to Coatesville, Pennsylvania; that thereupon an order bill of lading covering the shipment by railroad of said ore so loaded in Erie car No. 51611 from initial point of shipment, to wit, Clovis, California, to Coatesville, Pennsylvania, was issued by the Southern Pacific Company to said defendant in which the defendant herein is both consignor and order consignee and the Midvale Steel & Ordinance Company the "notify" party; that said defendant executed the appropriate shipping order covering the movement by railroad of said ore so loaded in Erie car No. 51611, as aforesaid, from Clovis, California, to Coatesville, Pennsylvania, consigned to the defendant with instructions to notify Midvale Steel & Ordinance Company.

Upon the arrival of said Erie car No. 51611 at destination, to wit, Coatesville, Pennsylvania, the said car loaded with said chrome ore was placed by the plaintiff upon the premises of the Midvale Steel & Ordinance Company for unloading on December 5, 1918; that on or about December 9, 1918, the said Midvale Steel & Ordinance Company refused to accept delivery of the said shipment of chrome ore.

On the 2nd day of January, 1918, the United States Railroad Administration wrote to the defendant the following letter:

“Mr. R. D. Adams
Humboldt Bank Bldg.
San Francisco, Cal.

Dear Sir:

On December 9, the Midvale Steel & Ordinance Company, Coatesville, Pa., refused to accept delivery of Erie Car #51611, chrome ore, shipped from the Pacific Coast, purchased by them from E. C. Humphreys Company, Chicago, Ill.

I accordingly communicated with E. C. Humphreys Company, requesting that they furnish disposal orders for the car in order that further delay to same might be avoided. They advise me, however, that you were the shipper of same, and that they approached you for disposition.

I trust you appreciate that delays to equipment of this kind are very serious, and must be prevented as far as possible, and I will thank you to advise by return mail what disposition can be made of this shipment.

Yours very truly,
R. R. Blydenburgh”.

And in answer to said above mentioned letter the defendant wrote to the United States Railroad Administration, as follows:

“January 8, 1919

United States Railroad Administration
Broad Street Station
Philadelphia, Pa.

Gentlemen:

Replying to your letter File No. G-30, Desk 1, in reference to Car Erie 51611, chrome ore shipped by us to the E. C. Humphreys Company, beg to advise that they have purchased this car from us and we have delivered the bill of lading to them. This was an order bill of lading shipment and we cannot at present take up the matter of disposition of the car without the bill of lading.

For your information will state that we have no place we can dispose of this car outside of the destination it is at present and would suggest that you take the matter up with the E. C. Humphreys Company.

Yours very truly,

Adams & Maltby,

By C. S. Maltby.”

At the time of the shipment of said Erie car No. 51611 there existed between the defendant and the E. C. Humphreys Company a contract in writing. The shipment by said defendant of Erie car No. 51611 was made in pursuance of said contract with E. C. Humphreys Company, and the said Erie car No. 51611 was routed by defendant and sent “care E. C. Humphreys Company”, as per order bill of lading.

At the time the said contract of transportation was entered into between the plaintiff and defendant herein as evidenced by said order bill of lading, the plaintiff herein had no knowledge or information of any kind whatever of the contract and arrangement hereinabove set out.

At or about the same time the defendant shipped two other cars known as the Pa. 294001 and Pa. 825285 under said contract with the E. C. Humphreys Company to the Midvale Steel & Ordinance Company, and an order bill of lading was issued for each of said last two mentioned cars; by the terms of said order bill of lading the said chrome ore contained in each of said cars last named was consigned to the defendant, R. D. Adams, Care E. C. Humphreys Company, Coatesville, Pennsylvania, which was the same method used in respect to Erie car No. 51611; and it was provided by all of said bills of lading that said Midvale Steel and Ordinance Company at Coatesville, Pennsylvania, should be notified. At the time when each of these said cars reached the Midvale Steel & Ordinance Company at Coatesville, Pennsylvania, it refused to accept delivery thereof; and after receipt of the letter of January 8, 1919, from Adams & Maltby to the United States Railroad Administration, the said Administration took the matter up with E. C. Humphreys Company therein referred to; and on the 13th day of January, 1919, one Reinhart, representing the E. C. Humphreys Company, went to the United States Railroad Administration and

asked it to unload and store the chrome ore in Erie car No. 51611, Pa. car 825285 and Pa. car 294001; and thereupon and at the request of E. C. Humphreys Company the said railroad unloaded the said chrome ore on the ground and on a platform on its right of way at Coatesville, Pennsylvania. Thereafter, the E. C. Humphreys Company sold the two Pennsylvania cars and, at the request of the said E. C. Humphreys Company, the two Pennsylvania cars were reloaded by the railroad and in March, 1919, were shipped to the parties designated by the E. C. Humphreys Company. The said E. C. Humphreys Company continued its efforts to sell, at a price satisfactory to said E. C. Humphreys Company, the chrome ore in Erie car No. 51611 after the disposal of the chrome ore in the two Pennsylvania cars and requested the said railroad to keep said ore in storage pending these efforts.

The said railroad kept the said chrome ore in storage, as aforesaid, until the 16th day of June, 1919, when in accordance with law and pursuant to the orders of the Railroad Administration the railroad sold the said ore for charges, and received therefor the gross sum of \$765.00.

At the time of the shipment of the said chrome ore in Erie car No. 51611, the Southern Pacific Company issued to the said defendant, R. D. Adams, the said order bill of lading. The said defendant attached this order bill of lading to a draft on the E. C. Humphreys Company and sent the bill of lading and the draft to the First National

Bank of Commerce at Detroit. The amount of said draft was \$2,325.13; and, prior to the arrival of said Erie car No. 51611 at Coatesville, Pennsylvania, the said E. C. Humphreys Company paid the said draft and received the bill of lading, and, on the arrival of said car at Coatesville, Pennsylvania, directed the disposition thereof.

The said plaintiff herein had no knowledge or information of any kind whatever of any arrangement between the defendant, R. D. Adams, and the E. C. Humphreys Company, or of the issuance and payment of the draft mentioned and hereinabove set out.

The plaintiff herein sold the said shipment of chrome ore, pursuant to law and the orders of the Railroad Administration, after proper and legal notice to the defendant consignor and consignee for the best price it could obtain under all the circumstances and, therefore, realized the greatest sum available for said chrome ore under all the existing circumstances in connection with said shipment.

The charges on this shipment of chrome ore up to the time of placement at the Midvale Plant at Coatesville, Pennsylvania, were, as follows:

Demurrage at point of origin	\$12.00		
Diversion at Tucson, Arizona	2.00		
Freight charges at rate of 84.5 cents per 100 pounds, Clovis, Cal. to Coatesville, Pa.	859.37		
	<hr/>		
	873.37	War	Tax
Against these charges we credit net proceeds of sale, \$758.66, applied	736.38	"	"
	<hr/>		
Leaving unpaid balance of	136.99	"	"
Additional charges accrued are:			
P&R demurrage at Coatesville	130.00	War	Tax
PRR " " "	110.00	"	"
PRR unloading " "	7.63	"	"
PRR storage " "	1290.00		
	<hr/>		
Total to be collected	\$1674.62		
\$1685.97.			

Under the provisions of the published storage Tariff Schedules, shipments unloaded by the carrier to release equipment were charged storage at same rates as would have accrued under demurrage rules had the goods remained in the car. The reasonable rate to be charged, and the only rate which could have been charged for the storage of said chrome ore, was the rate fixed by the provisions of the published Tariff, to wit: Charges applicable after free time, forty-eight hours, has expired for each of the first four days \$3.00, for each of the next three days \$6.00 and for each succeeding day \$10.00.

All of the charges mentioned herein, to wit, freight diversion, demurrage, storage and unloading are assessed and computed under appropriate Tariff Schedules published and filed by the plaintiff with the Interstate Commerce Commission as provided by law, and that they are in all respects legal and proper.

R. D. Adams has not paid any of said charges including freight, diversion, demurrage, storage and unloading of said shipment of chrome ore.

At the time the said bill of lading herein referred to was issued to the said defendant, he did not reside at Coatesville, Pennsylvania and said defendant did not accept delivery of said chrome ore at Coatesville, Pennsylvania.

The said bill of lading so as aforesaid issued by the Southern Pacific Company to R. D. Adams, defendant consignor and consignee, shows upon its face that said shipment of chrome ore to Coatesville, Pennsylvania, was made at the request of the defendant, R. D. Adams; and the "notify" party, Midvale Steel & Ordinance Company, refused to accept the said shipment of chrome ore upon its arrival at Coatesville, Pennsylvania.

The Federal Order No. 34A effective at the time of the arrival of this freight read, with reference to unperishable freight, in part, as follows:

"Carriers subject to Federal control shall sell at public auction to the highest bidder without advertisement carload and less than car-

load non-perishable freight which has been refused or is unclaimed at its destination by consignee *after the same has been on hand sixty days*. Consignee, as described in the waybilling, shall be notified of arrival of shipment in all cases and such notice shall contain a provision that if freight is unclaimed or undelivered for fifteen days after expiration of free time at destination, it will be treated as refused and may be sold without further notice sixty days *from date of arrival.*”

The Pennsylvania Statute applicable to the sale of freight which has not been taken by the owner or consignee and which statute was in effect at the time is known as “No. 965, An Act Relating to the liens of common carriers, and others”.

R. D. Adams, defendant herein, did not give any direct personal notice to the plaintiff or to the Pennsylvania Railroad to store the shipment in car Erie 51611, and R. D. Adams at all the times herein mentioned steadfastly refused to give or make any disposition order of said car Erie 51611 to plaintiff or to the Pennsylvania Railroad.

(Tr. 20-29; Tr. 35-37.)

The Issues of Law.

3. ASSIGNMENT OF ERRORS.

1. The said United States District Court, in and for the Northern District of California, erred in denying the motion of the plaintiff and plaintiff

in error to strike out portions of the original answer filed by the defendant in said cause of action.

2. The said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of defendant and defendant in error and against the plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action.

3. The said United States District Court, in and for the Northern District of California, erred in rendering its decision in favor of defendant and defendant in error and against the plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action, and in entering judgment in accordance therewith.

4. The said United States District Court, in and for the Northern District of California, erred in rendering its decision and entering its judgment thereon in favor of defendant and defendant in error and against plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action in this: That said decision is against law.

5. The said United States District Court, in and for the Northern District of California, erred in rendering its decision and entering its judgment

thereon in favor of defendant and defendant in error and against plaintiff and plaintiff in error for charges for storage subsequent to January 8, 1919, as set out in the agreed statement of facts filed in said action, in this: That said decision and said judgment is against law.

6. The said United States District Court, in and for the Northern District of California, erred in holding that plaintiff had knowledge of the sale and passing of title to Humphreys Company at the time of the transactions out of which the plaintiff's claim arose.

7. The said United States District Court in and for the Northern District of California, erred in holding that Humphreys took any orders from Adams, except as agent for Adams.

8. The said United States District Court, in and for the Northern District of California, erred in holding that Humphreys Company, and not defendant, was obligated to plaintiff for the storage of said chrome ore after January 8, 1919.

9. The said United States District Court, in and for the Northern District of California, erred in holding that defendant Adams, was entitled to and should receive the proceeds of the sale of said chrome ore, when Humphreys Company was the owner at the time of sale.

10. The said United States District Court, in and for the Northern District of California, erred in

assuming that plaintiff was dealing with Humphreys Company otherwise than as the agent for defendant, Adams.

11. The said United States District Court, in and for the Northern District of California, erred in holding that the plaintiff and plaintiff in error had notice of the sale of the said chrome ore to Humphreys Company at the time of the transactions out of which the plaintiff's claim arose.

12. The said United States District Court, in and for the Northern District of California, erred in holding that the liability of the shipper for the lawful charges accruing in this case arose out of considerations of ownership and not out of the request for the service.

13. The said United States District Court, in and for the Northern District of California, erred in considering the question of ownership of the said chrome ore, raised by the defendant and defendant in error, in making its decision in said action; and upon the evidence and record herein, the said Court should have rendered its decision in favor of the plaintiff and plaintiff in error in accordance with the prayer of the complaint in said action, and against the defendant and defendant in error.

Argument.

4. OUTLINE OF POINTS URGED BY PLAINTIFF IN ERROR.

(a) That the storage charges sought to be recovered in this action of and from the said defendant constitute part of the transportation charges.

(b) The original and primary liability of the consignor remains even in those cases where the carrier has entered into a specific contract to look to one other than the shipper for payment of such charges.

(c) The payment of storage charges arises by operation of law and not by contract and they are within the contemplation of the parties to any contract of shipment at the time it is entered into.

(d) The carrier here is not concerned with any question of title to goods or property shipped, but the question at issue is the payment of lawful tariff charges.

(e) In view of the finding of the lower Court that title to this consignment was in the E. C. Humphreys Company after January 8, 1919, it is legally impossible to allow the defendant in error the proceeds of the sale of said property.

Consideration of Assignment of Errors.

5. FIRST ASSIGNMENT.

The first assignment of error is in connection with the refusal of the United States District Court

to strike out portions of the answer filed by the defendant in error in said cause. The motion of plaintiff in error to strike out parts of the answer was directed to the following portions of said answer; and should have been granted.

“Said defendant entered into a contract in writing with E. C. Humphreys Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, by which said defendant agreed to sell and deliver to said E. C. Humphreys Company 1046 tons of low grade and 608 tons of high grade chrome ore; that a copy of said agreement marked ‘Exhibit A’ is hereto attached, hereby referred to and made a part hereof for all purposes, and that in pursuance of said agreement”

(Tr. page 11, lines 23-32.)

“That at the time of the issuance of said bill of lading to the said R. D. Adams, the said R. D. Adams did not reside at Coatesville and did not expect delivery of the said chrome ore at Coatesville, Pennsylvania; that the value of said chrome ore at said time of shipment was the sum of \$2,852.13; that after the issuance of said bill of lading the said defendant endorsed the same and delivered it to the said E. C. Humphreys Company who thereupon became the owner and consignee of the said shipment of chrome ore; that the said shipment of chrome ore was destined for and intended for the Midvale Steel and Ordinance Company; that this defendant is informed and believes and therefore alleges that the said E. C. Humphreys Company agreed to sell the said car of ore to said Midvale Steel & Ordinance Company;”

(Tr. page 12, lines 13-29.)

“That thereupon the said E. C. Humphreys Company directed and requested the Director

General of Railroads to unload the said ore and to store the said chrome ore until it, the said E. C. Humphreys Company, could re-sell it to some other person; that thereupon the said E. C. Humphreys Company for three or four months attempted to re-sell the said chrome ore to some other person, firm or corporation; that the said Director General of Railroads in compliance with the said request and demand of the said E. C. Humphreys Company unloaded the said ore and stored the same;"

(Tr. page 13, lines 2-14.)

"That on the contrary the said E. C. Humphreys Company agreed to pay said freight on the said ore; that after the ore had remained in storage as requested by the said E. C. Humphreys Company"

(Tr. page 13, lines 16-20.)

"That all of said sums were incurred at the special instance and request of the said E. C. Humphreys Company;"

(Tr. page 14, lines 1-3.)

"That the reasonable value for the storage of said ore could not exceed the sum of \$100.00; that the said ore remained stored at the request of the said E. C. Humphreys Company for three or four months after the arrival thereof at Coatesville, Pa.;"

(Tr. page 14, lines 4-9.)

"That the said E. C. Humphreys Company accepted the said shipment and agreed to pay the freight therefor and ordered the ore stored as hereinabove set forth."

(Tr. page 14, lines 16-19.)

It is contended by the plaintiff in error that the above portions of the answer should have been stricken out by the Court for the reason that the matter so alleged is not material to any of the

issues raised by the complaint of the plaintiff in error. The contention of defendant in error that the shipment of ore was sold to the E. C. Humphreys Company raises the question of ownership which it seems clear, does not enter into this case.

We think all of the above portions are immaterial: First, because the substance of the parts asked to be stricken out is argumentative and said portions are conclusions of law; second, it is all immaterial because it relates to a shipment of ore to others than the Midvale Steel & Ordinance Co., for whose use the shipment involved in this litigation was apparently originally intended; and, third, it is immaterial for the reason that it purports to show that the defendant sold this shipment of ore to the Humphreys Company, that the latter paid for it, accepted it and directed the railroad as to its disposition.

The Courts, however, have uniformly held that in a suit by a carrier against one who, by executing a bill of lading and shipping order requests a certain transportation service, the *question of the ownership is immaterial and that the original liability of the shipper for the lawful charges arises out of the request for service and not out of considerations of ownership.*

In considering this very question, Judge Hawley, of this District Court of Appeal, said:

“The question of ownership may be considered immaterial, under the facts of this case.

The rule is that the consignor is the party primarily liable for the payment of the freight, and this rule is enforced, independent of the question whether the consignor is the owner, and regardless of the question whether the payment of freight is secured by a lien on the cargo, because the consignor is the party for whom the service is performed. This rule is applied to clauses, often found in bills of lading, 'he or they paying freight', or 'he, the consignor, paying freight'."

Portland Flouring Mills Co. v. British F. M. Ins. Co., 130 Fed. 860 at 864.

And, in deciding the above case, Judge Hawley cited and referred to the case of *Wooster v. Tarr*, 85 Am. Dec. 707, in which Judge Bigelow, C. J., said:

"The question raised in this case is very fully discussed in *Blanchard v. Page*, 8 Gray, 281, 286, 290-295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between the shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. * * * Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or

owner may be inferred, *this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.*”

Wooster v. Tarr, 85 Am. Dec. 707;

P. C. C. & St. L. Ry. v. Fink, 250 U. S. 577;

Great Northern Ry. v. O'Connor, 232 U. S.

508.

6. SECOND, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERRORS.

The second, third, fourth and fifth assignments of errors deal with the failure of the United States District Court to hold defendant in error responsible, as a matter of law, for the storage charges which accrued upon this freight subsequent to January 8, 1919, and up to the time that the ore in question was sold by the carrier in accordance with the statute of Pennsylvania and order of the Director General governing the sale of unclaimed freight.

Corpus Juris lays down the broad proposition, as follows:

“The owner of goods for whose benefit and under whose direction they are shipped is liable for the freight charges.”

10 Corpus Juris 447, Section 702 (c) and other cases cited.

Barnard v. Wheeler, 24 Maine 412;

Grant v. Wood, 47 Am. Dec. 162.

And the general rule is aptly expressed by Mr. Hutchinson in his work on Carriers, in the following way:

“The remedy against the consignee is not exclusive although he may be the owner of the goods. It is held not to be obligatory upon the carrier to collect the freight of him even when the bill of lading contains the clause ‘he paying the freight thereon’. Such provision, it has been decided, is not intended for the exclusive benefit or accomodation of the freighter or shipper of the goods, and imposes no duty on the carrier to collect the freight of the consignee, but he may even waive his lien upon the goods by delivering them to the consignee without requiring pre-payment of the freight and still hold the shipper liable upon the contract of shipment.”

It has been held that under the Interstate Commerce Act, the term “transportation” embraces all services in connection with the shipment, *including storage of goods after arrival at destination*. It is apparent, therefore, that the charges here in question, having been assessed for storage service following the transportation of the lading to destination, are “transportation charges” within the meaning of Section 1 (3) of the Interstate Commerce Act.

41 Stat. L. 474; U. S. Comp. Stat. Sec. 8653
et seq.

It is admitted that the defendant in error, R. D. Adams, was the consignor of the shipment here under consideration and the consignor with whom

the contract of shipment is made is primarily liable for the payment of the freight and other transportation charges whether he is the owner of the goods or not.

10 Corpus Juris, Sec. 699, page 445 and cases there cited.

By an examination of the authorities in reference to the questions here under discussion, it will be found that the original and primary liability of the shipper for transportation charges exists even where the provisions of the bill of lading direct that the charges shall be paid by the consignee or owner and the following authorities will be found to uphold this statement.

Spencer v. White, 1 Tredell 236 (N. C. 1840);
Layng v. Stewart, 1 W. & S. 222 (Pa. 1841);
*Coal & Coke Ry. Co. v. Buchanan River C.
 & C. Co.*, 87 S. E. 376.

And further in this connection, even where the notation "charges collect" is found incorporated in the bill of lading signed by an agent of the carrier, that does not constitute a special contract precluding the carrier from looking to the consignor, who is primarily liable, for the transportation charges.

S. Cotton Oil Co. v. So. Ry. Co., 95 S. E. 251;
S. A. L. Ry. Co. v. Montgomery, et al., 112
 S. E. 652.

Upon examination of the case of Wells Fargo & Co. v. Cuneo, it is found that an agreement by

a carrier with a shipper to collect its transportation charges from the consignee and no other person, did not prevent recovery from the shipper. The general rule being that the consignor is primarily liable for such charges.

Wells Fargo Co. v. Cuneo, 241 Fed. 727.

“The consignor is ordinarily liable for freight charges. He requires the carrier to perform the service when he delivers the goods for transportation and thereby obligates himself to pay therefor. *The usual stipulation in the bill of lading that the consignee shall pay the freight imposes no obligation on the carrier to insist on payment of freight before delivery to the consignee.* It is not a part of the contract between consignor and carrier that the latter shall collect its bill of the consignee. The carrier may neglect to collect of the consignee and collect of the consignor.”

N. Y. C. R. R. v. Warren Ross Lumber Co.,
137 N. E. 324.

And the liability of the consignor remains irrespective of any contract to collect freight charges from the consignee:

C. C. C. & St. L. Ry. v. Sou. C. of C., 248 S.
W. 297;

N. Y. C. R. R. v. Federal Sugar Refining Co.,
139 N. E. 234.

It will be observed that the above cited cases deal mostly with the collection of freight charges as such, but is the contention of plaintiff in error that, *under the Interstate Commerce Act, the term “transportation” is broad enough to and does embrace all*

services in connection with the shipment of property, including storage of same after arrival at destination and it has been so held by our Courts.

The case of *Cleveland C. C. & St. L. Ry. Co. v. Dettlebach* will be found to be an interesting and instructive case on this very question and Justice Pitney, who delivered the opinion of the Court, said, in speaking of the carrier's responsibility as a warehouseman:

“And this is quite in line with the letter and policy of the commerce act, and especially of the amendment of June 29, 1906, known as the Hepburn act (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, Sec. 8563) *which enlarged the definition of the term ‘transportation’* (this under the original act, included merely ‘all instruments of carriage’) so as to include ‘cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and *all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.*”

From this and other provisions of the Hepburn act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, *in order to prevent overcharges and discrimination of performing such additional services it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term ‘transportation’ and sub-*

jected to the provisions of the act respecting reasonable rates and the like.”

Cleveland C. C. & St. L. R. Co. v. Dettlebach,
239 U. S. 453 at 457.

It cannot be contended other than that the storage charges which the plaintiff in error is seeking here to recover are terminal charges and, together with demurrage and other charges, can be recovered in cases of this character, and in support of this contention, we quote the language used by District Judge Young in the case of *Lehigh Valley R. Co. v. United States*:

“Thus, we see by the language of the Act, ‘transportation’ is defined to include terminal charges. It must be conceded that demurrage being a charge for the detention of a car because of the use of the car and track until unloaded is a terminal charge * * *.

To hold otherwise than that demurrage is part of transportation and part of the terminal charges would be to open the door to a railroad company to allow favored patrons to occupy the tracks and the cars for such demurrage charges as they chose * * *.

If, therefore, the terminal charges are part of the transportation and if demurrage charges are included in the term ‘terminal charges’, then clearly the failure to observe these tariffs and the soliciting and receiving of concessions are misdemeanors for which a prosecution will lie.”

Lehigh Valley R. Co. v. U. S., 188 Fed. 879
at 885-6.

And to the same effect we find the case of *Davis v. Timmons ville Oil Co.*, where the Court said:

“Demurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law. They are a part of the tariff, and must be collected from the shipper or the consignee of the freight to the same extent as the charge for carriage.”

* * * The duty of the carrier, the consignee, and the shipper is arbitrarily fixed, each is charged with notice of all that is thereby imposed and neither the negligence of the carrier to collect the rate, unless such negligence continue beyond the statutory period of limitations, nor the failure of the shipper or consignee, however innocently done, to pay it, may be urged as a defense in an action for its recovery.”

Davis v. Timmons ville Oil Co., 285 Fed. 470
at 472-4.

It becomes apparent from the examination of the above cases and the holding of the Courts therein that the instant action embraces all transportation charges, including the *storage which is the great bone of contention in this case*, for the payment of which the defendant in error is originally and primarily liable. It would seem, therefore, that any further citation of authorities upon this particular question would be useless and unnecessary.

It is admitted in this case that all of the charges mentioned herein, to-wit, freight, diversion, demurrage, *storage* and unloading are existing and computed under appropriate tariff schedules, published and filed by the plaintiff with the Interstate Com-

merce Commission as provided by law and that they are in all respects legal and proper. But, notwithstanding this admission, it is, of course, well-settled that the provisions of a carrier's tariff on file with the Interstate Commerce Commission are notice to the world and binding upon shippers whether the latter have actual knowledge of the terms of the tariff or not, and the rates, as determined by the tariff, must be enforced irrespective of the contract between the parties.

L. & N. R. R. v. Maxwell, 237 U. S. 94.

Western Transit Co. v. Leslie, 242 U. S. 448;

P. C. C. & St. L. Ry. v. Fink, 250 U. S. 577;

York & Whitney Co. v. N. Y. C. R. R., 256 U. S. 406;

Cook v. Nor. Pac. Ry., 203 Pac. 512;

Sinclair Ref. Co. v. Schaff, 275 Fed. 769.

We respectfully submit that the learned Judge below was in error when he determined that

“demurrage and storage after carriage completed is implied rather than expressed and arises only incidentally.” (Tr. page 40.)

It would appear, from an examination of the authorities, to be settled law that at the time of entering into the contract of shipment the accrual of demurrage and storage charges is a matter within the contemplation of the parties to the contract and the assessment of such charges arises by operation of law. The rule is well expressed in the case of *Pennsylvania Railroad Company v. Whit-*

ney & Kemmerer, 73 Pa. supra, 588, wherein the Court said, at pages 995-6:

“Under the Act of Congress the charge for demurrage becomes a charge incidental to the transportation of the property, and it is the duty of the carrier to exact it from all shippers without discrimination. When the defendants shipped the car in question they are presumed to have known that the tariffs filed with the Interstate Commerce Commission would require the carrier to collect a demurrage charge of \$1 per day, excluding Sunday and legal holidays, for each day the car was held by plaintiff at its destination and not unloaded by the consignee within forty-eight hours after placement of said car for delivery. The law was notice to the shipper that the charge would be made upon the shipment and the carrier was not required to give notice that it would comply with the duty by the law imposed.”

Pa. Railroad Co. v. Whitney & Kemmerer,
73 Pa. supra 588.

In the case just cited the Court held the shipper responsible for the transportation charges which had accrued—and we think properly so. This case is very similar to the one at bar and we think exactly in point as to the contention of the plaintiff in error that the terminal charges, such as demurrage and storage after carriage completed, are not implied but arise by positive law.

“Such charges do not result from any private contract between the carrier and either the shipper or consignee. They are not the subject of private contract. When the schedule of tariff is duly filed and published, the rates become matters of positive law and ship-

pers, carriers, consignors and the like are charged with knowledge of them. The carrier is bound to collect and the consignor or shipper is bound to pay the correct charges as set forth in the published tariffs.”

Id. 595;

Phila. & Reading Ry. Co. v. Baer, 56 Pa.

Sup. Ct. 307;

W. J. & C. Shore R. R. Co. v. Whiting L. Co.,

71 Pa. Sup. Ct. 161.

It is anticipated that perhaps the defendant in error may raise some question as to the reasonableness of the charges for storage which are here attempted to be recovered but the present action is brought to recover transportation charges, which include the *storage accrued*, provided for in tariffs lawfully and admittedly on file with the Interstate Commerce Commission. Any question, therefore, which may be raised by defendant in error with regard to the reasonableness of such charges will be beyond the jurisdiction of this Court for the reason that the decision of any such question is dependent upon a preliminary resort to the Interstate Commerce Commission.

Great Northern Ry. v. O'Connor, 232 U. S. 508;

Chesapeake & Ohio C. & C. Co. v. T. & O. C. Ry., 245 U. S. 917;

Great Northern Ry. v. Merchants Elevator Co., ~~295~~ U. S. 285.

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7. SIXTH, SEVENTH, EIGHTH, TENTH, ELEVENTH AND
TWELFTH ASSIGNMENTS OF ERRORS.

The sixth, seventh, eighth, tenth, eleventh and twelfth assignments of errors relate to the question of ownership of the ore in question as between defendant in error and the E. C. Humphreys Company and the notice given the carrier thereof. But, as we have heretofore observed, carriers are not concerned with questions of title.

232 U. S. 508.

In the case of *Great Northern R. Co. v. O'Connor*, the Court, in determining a question of rates used the following language:

“This was the ruling in *Interstate Commerce v. Delaware L. & W. R. Co.*, 220 U. S. 235, where it was held that the carriers were not concerned with the question of title; but must treat the forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles.”

Great Northern R. R. Co. v. O'Connor, 232
U. S. 508 at 514-516.

In dealing with a case involving the liability of a consignee for the transportation charges following his acceptance of the goods transported, the United States Supreme Court made use of the following language:

“It is alleged that a different rule should be applied in this case because Fink, by virtue of his agreement with the consignor did not become the owner of the goods until after the same had been delivered to him. There is no

proof that such agreement was known to the carrier *nor could that fact lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods.*"

P. C. C. & St. L. Ry. v. Fink, 250 U. S. 577
at page 582.

The above language applies with even greater force to a case involving the liability of a shipper, for, as has been shown, the consignor is originally and primarily liable for payment of transportation charges, even though the carrier has by express contract agreed to look to the consignee for payment of its charges. A carrier has the right to look to the shipper for payment of the transportation charges and no agreement can be entered into to prevent the collection of any but the lawful charges.

Lexington Compress & Oil Mill Co. v. Yazoo & M. V. R. R., 95 So. 93.

It would seem, then, that the above authorities would dispel any idea which the defendant in error might advance that by carrying out the directions of the E. C. Humphreys Co. with regard to the storage of the ore, the carrier had elected to look to that company for the payment of the storage charges, for, as we have observed, the ultimate liability of the shipper still remains.

"The railroad company may demand the amount of transportation charges from the consignee or it may collect from the consignor. It cannot make an election nor be held to an estoppel without violating the purpose and spirit of the Interstate Commerce Act, U. S.

Comp. Stat. Sec. 653 et seq.) *In order to prevent preference, it is obliged to collect its freight charges and if it cannot get them from one party, it must look to the other. Delivery of the goods without collection is no waiver or release of any or either party.*”

N. Y. C. R. R. v. Federal Sugar Refining Co.,
139 N. E. 234.

And, inasmuch as the defendant in error, R. D. Adams, who was both the consignor and the consignee in the instant case, and the ostensible consignee, the Midvale Steel & Ordinance Co., and all other parties concerned herein, refused the shipment upon its arrival at destination, it becomes obvious that the carrier was forced to look to the shipper for reimbursement of its charges, which, in this case, it is contended, *include all charges from the time of shipment to the time of sale of the said lading by the carrier.*

8. NINTH ASSIGNMENT OF ERROR.

The ninth assignment of error is based upon the opinion of the District Court and the utter impossibility of allowing one other than the owner the proceeds of the sale of said chrome ore.

Upon reference to the Court's decision upon the merits (Tr. page 40), it will be discovered the Court finds that

“plaintiff is entitled to recover of and from defendant the charges set out in said statement to and including January 8, 1919.”

And also finds that

“The defendant was not the owner of the goods and that plaintiff knew this on and after January 8, 1919.”

In view of the fact, therefore, that the sale did not take place until after January 8, 1919, to-wit, about the 16th day of June, 1919, and considering this fact and that the defendant in error was not the owner of the goods, we fail to see how he could properly receive the proceeds of the sale of the ore when it appears herein that the E. C. Humphreys Company had already paid the defendant in error for the ore. It would seem a necessary corollary that if, after January 8, 1919, and on the day of the sale of the ore, E. C. Humphreys Company was the owner thereof, that it should receive the proceeds of the sale of its own property.

Conclusion.

We attempt here to summarize the argument, if perchance it has reached that dignity, in this wise:

By the admitted facts (Tr. pages 20-29) herein, the defendant is both the consignor and order consignee and as such shipped from Clovis, California to Coatesville, Pennsylvania, in November, 1918, a carload of chrome ore upon which he has not paid legal freight, diversion, demurrage, storage, unloading and other charges incidental to said shipment.

That he refuses to pay same upon the ground that he sold the lading during transit to the E. C.

Humphreys Co., and at the time of its arrival at destination, he was not the owner, and, therefore, refused to receive said ore or to give or make disposition orders for same, claiming that the E. C. Humphreys Company should and did give its order as to the disposition of said car and its contents.

But the plaintiff in error had no knowledge or information of any kind whatever of any arrangement between the defendant in error and the said E. C. Humphreys Company, or of the issuance and payment of the draft mentioned and set out in paragraph IX of the admitted statement of facts. (Tr. pages 26-27.)

That after the refusal of any party to the shipment or bill of lading, to accept and dispose of the ore, the plaintiff in error sold the same, under and pursuant to the mandate of the law and the orders of the Railroad Administration, after proper and legal notice to the defendant consignor and consignee, for the *best price* it could obtain under all the circumstances; that there was received as the proceeds of said sale \$758.56.

That after applying the proceeds of the sale to the whole charges there was left a balance of \$1,685.97 lawfully accrued as a result of the transportation services admittedly performed, which is legally due from someone.

It is clear that there are but three parties who could be, under any circumstances, called upon to pay these charges, and those are: Plaintiff in error,

E. C. Humphreys Company and Midvale Steel and Ordinance Company. We cannot ask the Humphreys Company to pay same because it was neither shipper nor consignee, but merely the "care of party," and consequently, as a matter of law, is to be regarded merely as the agent of the consignor, and has no individual responsibility or liability in this connection.

Neither can we ask the Midvale Steel and Ordinance Company to pay these charges, because that company did not accept and receive the shipment, and, therefore, did not in any sense ratify the contract of transportation between plaintiff in error and defendant in error, Adams.

And, consequently, by the process of elimination, R. D. Adams, the defendant in error, is the only party involved in the transaction to whom the plaintiff in error can properly look for its charges lawfully made for the transportation services so rendered.

As it is the lawful right of the plaintiff in error, he has elected to sue the defendant in error to recover the charges he contracted to pay and in view of the cited authorities it seems entirely unnecessary to argue further that it is not only the lawful right, but in this case *it was the duty of plaintiff in error to look to the original and primary source* for the collection of the transportation charges imposed by law, to-wit, to R. D. Adams, defendant in error.

If, as is here admitted, the plaintiff in error entered into a written contract to pay the "transportation" charges which should accrue against his property and if, "transportation" embraces all services in connection with the shipment, *including storage of goods* after arrival at destination, is he not then originally and primarily liable for all such charges? If Adams was liable originally, there was nothing to change his liability and he, therefore, remains indebted to the government in the amount sued for.

The bill of lading, together with the tariff schedule approved by the Interstate Commerce Commission constitutes the contract which tied Adams to the debt the plaintiff in error now seeks to recover and, as was said by Judge Cushman in *Great Northern Ry. v. Hyder*, 279 Fed. 783, "the shipper, the carrier and the consignee are all agents and trustees of the public, and no complications arising out of the agreements between them, or shuffling, should defeat the purpose of the act requiring the full and exact payment of the charges as fixed by the filed, posted and published tariff.

We, therefore, most respectfully submit that the defendant in error solicited the service when he delivered the goods for transportation and thereby obligated himself to pay therefore.

We ask, therefore, that the case be remanded to the lower court with directions to enter judgment

in accordance with the prayer of the amended complaint in said cause.

Dated, San Francisco,
October 17, 1923.

Respectfully submitted,

P. H. JOHNSON,

Attorney for Plaintiff in Error.

JAMES E. GOWEN,
Of Counsel.

No. 4028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, Director General of Railroads, as Agent, pursuant to Section 211, Transportation Act, 1920,

Plaintiff in Error,

vs.

R. D. ADAMS,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Upon Writ of Error to the United States Circuit Court of Appeals,
for the Ninth Circuit.

KEYES & ERSKINE,
Attorneys for Defendant in Error.

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Upon Writ of Error to the United States Circuit Court of Appeals,
for the Ninth Circuit.

STATEMENT OF FACTS.

As the plaintiff in error and the defendant in error were the plaintiff and defendant respectively in the lower court we will hereafter refer to them as "plaintiff" and "defendant".

On November 2, 1918, the defendant and shipper delivered to the plaintiff as carrier a car load of chrome ore. This ore was placed on Erie car No. 51,611. An order bill-of-lading was issued to the shipper as consignee with the words "Notify

Midvale Steel & Ordinance Company" written thereon. The destination of this car was Coatesville, Pa. It was purchased by the Midvale Steel & Ordinance Company from E. C. Humphreys Co., who in turn had purchased it from the defendant who was the shipper. It arrived at its destination on December 9, 1919. Before its arrival the defendant had sent to E. C. Humphreys Co., the order bill-of-lading with a draft for the purchase price of the car attached. E. C. Humphreys Co., paid the draft and received the bill-of-lading and at the time of the arrival of this car were the owners thereof and in possession of the bill-of-lading. At or about the same time the defendant shipped two other cars known as Pennsylvania 294001 and Pennsylvania 825285 to the Midvale Steel & Ordinance Co., at the direction of E. C. Humphreys Co. These two cars had also been sold by defendant to Humphreys Co. The method used in connection with said last two mentioned cars was the same method used in respect to Erie car No. 51611. When these two cars reached the Midvale Steel & Ordinance Co., at Coatesville, Pa., it rejected them and refused to accept delivery thereof. On January 2, 1919, the railroad notified the defendant of the arrival of Erie car No. 51611 at its destination and of the refusal of the Midvale Steel & Ordinance Co. to take the car and asked the defendant to give it the disposition of the car. (Tr. p. 22.) In answer to that letter the defendant wrote to the plaintiff on January 8th, as follows. (Tr. p. 23.) (We take

the liberty of quoting the letter in full because it has a vital bearing in support of our contentions):

“January 8, 1919.

United States Railroad Administration,
Broad Street Station,
Philadelphia, Pa.

Gentlemen:

Replying to your letter File No. G 30, Desk 1, in reference to Car Erie 51611, chrome ore shipped by us to the E. C. Humphreys Company, *beg to advise that they have purchased this car from us and we have delivered the bill of lading to them. This was an order bill of lading shipment and we cannot at present take up the matter of disposition of the car without the bill of lading.*

For your information will state that we have no place we can dispose of this car outside of the destination it is at present and *would suggest that you take the matter up with the E. C. Humphreys Company.*

Yours very truly,
Adams & Maltby
By C. S. Maltby.”

This letter it is admitted was received. It shows that the railroad was notified that E. C. Humphreys Co. was the owner of the car, held the bill of lading and that therefore the defendant could make no disposition of the car whatsoever and the plaintiff was referred to E. C. Humphreys Co., the owner of the car. It is claimed that the subsequent actions of Humphreys & Co., the purchaser of this car, bound the defendant because E. C. Humphreys Co. was acting as agent for the defendant. *Here is a clear and unequivocal notice*

to the railroad on January 8, 1919, before the storage charges sued for had accrued, that E. C. Humphreys Co. was not the agent of the defendant but was the purchaser of the chrome ore in the car and the owner thereof. After this notice the railroad could not claim that it dealt with Humphreys as the agent of the defendant.

The reference in the stipulation of facts to the lack of knowledge of the plaintiff of the arrangement between Adams and Humphreys Co., and of the payment by Humphreys Co. to Adams for this car of chrome refers only to that which occurred prior to the 8th of January, 1919. On that date, as we see from the foregoing letter, the plaintiff was notified by the defendant that Humphreys Co. had purchased the car and was the owner of it and of course thereafter it had knowledge of the facts. The paragraph in the stipulation stating that it had no knowledge obviously means that it had no knowledge prior to January 8, 1919. Counsel in his brief keeps referring to the lack of knowledge of the plaintiff of the transaction between Humphreys Co. and Adams. We admit that the plaintiff knew nothing about it until January 8th, but after January 8th when it was notified in writing of the exact situation, thereafter it had knowledge and it dealt with Humphreys Co., with full knowledge that Humphreys Co. had purchased the car and that the defendant had no further control over it.

After this notice was received the railroad took the matter up with E. C. Humphreys Co., and on the 13th of January, 1919, without the knowledge or consent of the defendant and without defendant being advised thereof or being a party to the arrangement, one Reinhardt representing the E. C. Humphreys Co., requested the railroad to unload and store the chrome ore in Erie car No. 51611 and in the two other cars. The railroad at the request of Humphreys unloaded and stored this material. Humphreys then attempted to sell the material in these three cars. He was successful with respect to the other two cars, sold them in March, 1919, ordered the railroad to ship them to the parties designated by him and the railroad did so. (Trans. pp. 25 and 26.) Humphreys Co. continued its efforts to sell at a price *satisfactory to it* the ore from Erie car 51611 *and requested the railroad to keep the ore in storage* pending these efforts. (Trans. p. 26.) Humphreys Co. was unable to sell this ore, *and so it remained on storage at Humphreys' request until the 16th of June, 1919, over six months after its arrival at its destination.*

STORAGE CHARGES ACCRUING UNDER CONTRACT BETWEEN HUMPHREYS AND PLAINTIFF TO WHICH DEFENDANT WAS NOT A PARTY ARE NOT PART OF OR INCIDENTAL TO FREIGHT CHARGE AND ARE NOT CHARGEABLE TO DEFENDANT.

This arrangement for the storage of this carload of ore for a period of over six months, so as to

enable Humphreys Co. to effectuate a sale thereof was a separate and distinct arrangement between Humphreys and the railroad. *It was an entirely new and separate contract, made without the knowledge of the defendant to which he was not a party with which he had nothing to do and by which he should not be bound.*

It is apparent from counsel's brief that he misunderstands defendant's position. Defendant has always admitted that as shipper and consignor of this chrome ore he was liable for freight charges thereon. In our briefs in the lower court we admitted that the shipper was liable for freight and demurrage charges. We do not and have never questioned this rule. We contend however, *that when the plaintiff knowing that E. C. Humphreys Co. was the owner of the ore made a separate contract with Humphreys Co. to store the ore for Humphreys Co. until the latter could sell and dispose of the ore and storage charges accrued under that separate contract that defendant is not liable for such storage charges merely because he was the original shipper of the goods.* The lower court has held defendant liable for the *unpaid portion of the freight and demurrage charges* on these goods but it very properly refused to hold defendant liable *for over six months storage charges* accrued under a separate arrangement made on January 8, 1919, between the plaintiff and Humphreys Co., the owner of the goods.

On January 8, 1919, defendant notified plaintiff that Humphreys was the owner of the goods and to look to Humphreys. Plaintiff was told that defendant would have nothing to do with this ore and would give no direction concerning it. With this knowledge defendant enters into a new arrangement with Humphreys to store the ore for over six months while Humphreys tried to sell it. Of this arrangement defendant had no knowledge, was not a party to it and had nothing to do with it and yet it is now claimed that defendant should pay the charges accrued (*not under the original affreightment*) but under this entirely new arrangement made *when the affreightment had terminated*.

The contention that the shipper is liable for the transportation charges does not meet *the proposition that he is NOT LIABLE FOR CHARGES accruing under a separate contract between the carrier and the owner of the goods after the affreightment has ended*. Cases cited in favor of such a contention do not disprove such a proposition. On January 8, 1919, plaintiff knew defendant would not pay the freight and demurrage charges. Under Federal Order 34A (Trans. p. 36) it could have *stopped the accrual of further charges* by selling this ore "without further notice sixty days from date of arrival", which would have been February 8, 1919. Instead at the request of Humphreys, and by a separate agreement with that company,

it kept these goods stored over six months and now asks defendant who was not a party to or benefited at all by this arrangement, to pay for this storage. When plaintiff ascertained on January 8, 1919, that defendant would not pay the charges on this ore it was bound to do everything in its power to reduce and diminish the damages. It could not run them up and expect to hold defendant for the unwarranted excess, especially when this excess was incurred under a new contract with the owner of the goods and without the knowledge, privity or consent of the defendant.

See

Norfolk & S. R. Co. v. New Bern Iron Wks.,
90 S. E. 149 (hereafter quoted).

We admit that the word "transportation" includes all services *incidental* to the handling of freight *including storage*, but it does not include storage *that is not incidental to the original affreightment and that* arises out of a separate arrangement between the owner of the goods and the railroad.

We can see how absurd the contention is, that all charges against the goods no matter at whose request and when accrued are part of the original affreightment for which the shipper is liable, if we apply such a rule to instances that might arise.

Suppose Humphreys Co. had ordered the railroad to re-ship the car to New Orleans or to store

the ore in a bonded warehouse, or to treat it to save it from destruction or to incur some other expense in connection with it and that the railroad had followed this order, knowing Humphreys Co. to be the owner of the ore and without the knowledge and consent of the shipper and without his being a party to the arrangement, it could not possibly be claimed that the shipper would be liable for these additional charges. Now the storage charges here claimed are in the same category as the instances just cited. Suppose instead of having stored the ore for six months at the request of Humphreys and without defendant's knowledge or consent, it had stored it for five years. Could it be claimed that defendant as original shipper would be liable for these storage charges? Could it be claimed that they were incidental to the original affreightment and part of the transportation charges. The statement of the proposition furnishes its own refutation. There is no difference in principle between over six months and five years. *As soon as the new arrangement for storage was perfected between plaintiff and Humphreys on January 8, 1919*, then the subsequent accruing storage charges arose under that contract and not as incidental to the original affreightment.

When the defendant told the railroad that it did not own the ore, that is could not dispose of it and that it could not give any instructions to dispose

of it and that E. C. Humphreys was the owner of it and then the railroad at the request of Humphreys stored the ore for over six months for the benefit of Humphreys, it made an entirely new contract with Humphreys for which the defendant can in no wise be liable.

While there is very little authority on this question the cases which we have found which are at all in point sustain this proposition.

In *Elliott on Railroads*, Section 1559, in a note in the second Edition on page 334, under Section 1559, after citing cases showing that the consignor is primarily liable for the freight, Elliott says:

“As shown in some of the cases, however, the carrier may forfeit the right against the consignor *by making a new contract with the consignee or the like.*”

In *In re Arlington Hotel*, 88 Atl. 196 (Dela.), the question was whether or not the owner of the steel which was shipped by the plaintiff should pay the storage charged accrued after four months storage which storage was ordered by the consignee of the goods. It appeared from the evidence that the consignee was a builder who had agreed to construct a building for the hotel company and the hotel company had agreed to furnish to him the materials for the construction at the building. The builder was simply to erect a hotel with material furnished at the site by the hotel company. The court says:

“But the question at issue is not how much the charges should be but who is now liable for the payment of them. In other words the point to be determined is not how much is due but who is the person liable for the payment of what is due.”

In determining whether the shipper was liable for the storage charges as distinguished from the freight or whether the consignee who ordered the storage for three or four months was liable, the court said:

“From testimony of witnesses produced by the railroad company it appeared that it was arranged between the railroad company and the consignee (the builder) that the structural steel should be stored at a particular yard and in a certain manner to suit the convenience of the builder, and that it should be left there for a period of three or four months. * * *

It does appear from the testimony produced by the carrier, that there was an arrangement between the consignee the builder, as to the storage of the steel, and neither the Arlington Hotel Company, nor the receiver, are connected by any evidence with that arrangement. There is, moreover, ample evidence to show that the carrier did not look to the Arlington Hotel Company, or the receivers, for payment of the charges. * * *

Inasmuch as the carrier had already made some contract with the builder respecting the storage of the steel, the terms of which it declined to show, and had accepted from the owner a sum for demurrage charges and for other charges and did not file any claim in the receivership in the District of Columbia, *it is a fairly deducible inference that the carrier then looked to the consignee, the builder, and*

not the owner for payment of the other charges, viz., those for unloading and storage. It is urged by the carrier that the builder was acting as agent of the owner, and, therefore, the latter was liable. There were some general statements in the evidence as to some kind of an agency between the builder and owner, but whether or not the agency extended to the making of a contract concerning storing the steel is not shown. But assuming that there was in fact such an agency, it still was not shown by the carrier, who is bound to show it, that the builder made as agent for the owner a contract as to storage, and not on its own account. There is surely no reason to prevent the consignee from so contracting on its own account and not as agent. The acts of the carrier and its refusal to prove the real contract made by it with the builder inferentially show that the contract with the builder was not made as agent for the owner, but otherwise."

The foregoing is a decision to the effect that the consignee can make a separate contract with the carrier with reference to the storage of the goods and that such contract is not binding on the shipper simply because shipper is bound to pay the freight. This case is also authority against the proposition of the plaintiff that when Humphreys Co. ordered the storage of this car it ordered it as the agent of defendant. As the foregoing authority states the consignee can make a separate contract with the carrier and in doing so is not the agent of the shipper.

The case of *Great Northern Railway v. Hocking* (Wis.), 166 N. W. 41, is somewhat in point. The facts were practically the same as those here. The brick was ordered by the Bailey-Marsh Co. (corresponding to Midvale Steel Company), from the Payne-Nixon Co. (corresponding to Humphreys Co.), who bought from the defendant. The brick arrived and was rejected by Bailey-Marsh Co. Later Bailey-Marsh Co., and Payne-Nixon Co., agreed to pay the freight and demurrage charges and gave a note to the railroad for the same. The note was not paid. The railroad then sued the shipper of the brick. The lower court held that the defendant as shipper was liable for the freight and that even though the consignee and the purchaser from the consignee made a separate agreement with the railroad to pay the freight and demurrage charges and gave a note for the same that the railroad did not waive its claim against the shipper for the freight. The lower court allowed the freight under these circumstances but *it refused to allow the demurrage charges* against the defendant and made a distinction between the freight and demurrage charges and this refusal was upheld by the upper court.

Now our position is supported not only by these authorities but also by reason. *Demurrage and storage charges are entirely separate and distinct from freight. The carrier earns the freight as a carrier. It earns the demurrage and storage charges as a warehouse man.* When the liability

as a carrier ends then the liability as a warehouse man begins and the relation then between the warehouse man and the person owning the freight is entirely different from the relation between the carrier and the person owning the freight.

Elliott on Railroads, 3rd ed., secs. 2212, 2304.
Seaboard Air Line v. Shackelford, 63 S. E.
 252.

Again the consignor may be liable in many instances for freight where he is not liable for storage charges. For instance he is liable for freight but he is not liable for storage charges where the detention is caused by some other cause.

Pennsylvania Railroad v. Really, 81 Atl.
 646;
United States v. Texas Railroad, 185 Fed.
 820,

or where the detention on the part of the carrier has been wrongful.

Southern Pac. Co. v. Redding, 43 S. W.
 1061;
Hochfeld v. Southern R. Co., 64 S. E. 181.

So we see that the services performed are different, the liabilities are different and that the shipper may be liable for the freight while not liable for the storage.

Now it seems indisputable that where a person is not the owner of the goods and has no control over them he cannot be liable for storage and demurrage charges incurred by the real owner of the

goods under a separate arrangement between the real owner and the carrier made without the knowledge or consent of the defendant and to which he was not a party. It seems that to hold him liable for these charges which are separate and distinct from the freight charges, because he is technically liable for the freight charges is highly inequitable and unjust, particularly when the storage which has accrued and which was incurred at the request of the owner of the goods is entirely out of proportion to the value of the goods and the freight and almost double the amount thereof.

It will be noted that the storage charges which it is sought to collect by these proceedings were \$1545.06, as compared with \$899.01, the freight on the car and \$758.66, the value when sold of the ore.

In the case of *Yazoo v. Zemurray*, 238 Fed. 789, the court in discussing the liability of the shipper described it as a technical one and pointed out that *owner of the goods is the one ultimately and equitably bound to pay the freight*. In this respect the court said:

“However, in deciding the case against the plaintiff, I did so because I was satisfied the railroad could have collected from the consignee if it had sued him; that having elected to collect the freight from the consignee, who was the owner of the fruit and bound to pay the freight ultimately, *it would be inequitable to permit the carrier to change its base and proceed against the consignor, who was only technically liable. Conceding that Zemurray was primarily liable to the railroad because of having made the contract, the mode of shipment was prima facie*

notice to the carrier that the shipper had parted with ownership on delivery of the goods to it and that the shipment was for the account of the consignee. Before suit, the railroad was advised of the actual facts, and property of the consignee subject to execution pointed out. Considering all this, I see no reason to change my opinion."

Similarly we might say here that while defendant was technically liable to pay the freight because he was shipper, Humphreys Co., the owner of the goods, was ultimately and equitably bound to pay this charge. Now when the railroad made a new contract with Humphreys Co., knowing that he was the owner of the goods it could not claim that defendant's technical liability for freight charges covered the charges accruing under this new contract. To hold defendant liable for the storage charges outside of, incurred in a different way and entirely separate from freight charges would be, to use the language of the foregoing quotation "inequitable".

It might be said that the railroad was bound to hold the ore for at least sixty days and therefore that the defendant should pay the storage charges accrued for sixty days. The foregoing authorities cited show that the defendant is not liable *for the demurrage or storage charges when they were incurred at the request of the owner of the ore; that this agreement was separate and distinct from the agreement for freight and that the defendant was not a party thereto and is in no wise liable therefor.*

As this arrangement was made on January 8, 1919, the subsequently accruing storage charges arose out of this arrangement and not out of the original shipment. But assume that they did not and assume that the defendant is liable for the storage charges still the authorities hold that as he immediately refused to give disposition of the car and to pay the freight that plaintiff was bound to exercise its right to sell the car as soon as its obligation to hold it expired under the statute,—this was sixty days after arrival or about February 8, 1919, and under this view of the case, which is the most favorable view for the plaintiff, the defendant is only liable for a small fraction of the storage charge.

This very point was raised in the case of *Norfolk & S. R. Co. v. New Bern Iron Works and Supply Co.*, 90 S. E. 149. There the court said, at page 149:

“Under our statute, however, the right of foreclosure by sale in case of non-perishable freight is given after six months, and, while this is a state statute, being as it is, a part and in furtherance of the remedy afforded by the law in such cases, we see no reason, in the absence of any interfering regulation by congress or of the interstate commerce commission, why it should not prevail both as to inter and intra state shipments; and, under the recognized principle that both in case of tort and breach of contract an injured party is required to do what business prudence requires to minimize the loss (*Tillinghast v. Cotton Mills*, 143 N. C. 268; 55 S. E. 621; *Railroad v. Hardware Co.*, 143 N. C. 54, 55 S. E. 422), *we think the plaintiff may not recover for the entire time which*

has elapsed since this shipment was refused, but is restricted to the time when he could have relieved himself of the charge by sale pursuant to statute."

Counsel seems to think that because "the Hepburn Act" says that transportation includes terminal charges such as demurrage, handling and storage and because the shipper is liable for the transportation charges that the shipper is liable for all storage charges against the goods shipped. He claims that the shipper is liable for storage charges no matter how unnecessary the storage is to the original affreightment; however disconnected therefrom; *no matter whether ordered by someone other than the shipper for reasons entirely foreign to the original shipment* and no matter how long the storage continues for the benefit of someone else. According to him if the owner of goods asks the railroad to store them for five years (or for over six months as in this case) and accordingly the railroad does so, without the shipper's knowledge and consent, although it could have disposed of them in sixty days and thus stopped storage charges, that the five years' storage charges can be collected from the shipper. His idea is that the "Hepburn Act" makes the shipper liable for any charges against the goods as long as they remain in the railroad's hands, no matter what other contract and parties intervened. *The "Hepburn Act" does not by terms or by implication impose such a charge on the shipper.* Neither the "Hepburn Act" nor any of the cases

cited by counsel referring to it, including the *Cleveland v. Dettleback* case, have any application to the situation involved in this case. Storage charges, as in this case, unconnected with the original shipment and unnecessary thereto and incurred at the request of another do not come within the purview of that act and those cases and *are not considered in those cases* and the shipper is not liable for such storage any more than he would be on any other implied contract between the owner of the goods and the railroad unconnected with the original transportation of the goods.

Counsel says, they cannot ask Humphrey Co., to pay because it was not a party to the bill of lading. It was the owner of the goods. It is admitted these goods *were stored at its request for six months so it could sell them*. When it asked the railroad to store the goods and the railroad company did so Humphrey Company became liable for the storage charges. An implied obligation of Humphrey to pay these charges arose. Counsel has evidently forgotten the doctrine of "assumpsit". Humphrey Co., was bound to pay for this storage when it ordered it and counsel is mistaken in asserting that the railroad cannot ask it to. This storage is the only amount involved here as judgment has been entered in favor of plaintiff for the unpaid part of the freight, demurrage and handling and for storage up to date of the separate contract between plaintiff and Humphrey Co.

Accordingly we submit that the trial court was correct in determining, that the storage charges accruing under the arrangement between Humphreys Co., and plaintiff on January 8, 1919, could not be charged against defendant, that on that date the plaintiff and Humphreys Co., made a separate contract respecting those charges with which defendant has no connection and that defendant is not bound for charges accruing thereunder. The court found defendant liable for the unpaid portion of the charges accruing up to the time of this new contract between Humphreys Co., and defendant, and we submit that the judgment of the lower court was correct.

**REFUSAL TO GRANT MOTION TO STRIKE OUT PARTS
OF ANSWER WAS PROPER.**

The portion of the answer complained of showed that *Humphreys Co., was the owner of the ore and made the separate arrangement for storage* for over six months which we have heretofore referred to. As the storage charges which plaintiff is trying to collect from defendant accrued under this separate arrangement the defendant is not liable for them. Therefore the existence of an entirely new and different contract to which defendant was not a party under which these charges accrued is a complete defense to this action and accordingly was properly set up as such.

**PROCEEDS OF THE SALE OF ORE PAID PART OF THE
FREIGHT CHARGES.**

Plaintiff now claims that the proceeds of the sale of the ore should have been applied not to the freight charges which accrued first and which constituted the oldest item of the railroads account but to the storage charges which accrued last. Plaintiff makes this claim for the first time on appeal. It did not make this contention before or during the trial in the lower court or in computing the amount of the judgment after the decision of the court.

It will be noted that in its own account as rendered and as kept by it plaintiff applied the proceeds of the sale to the freight charges (see, Trans, p. 27). This is the way its account reads:

Demurrage at point of origin	\$ 12.00		
Diversion at Tuscon, Arizona	2.00		
Freight charges at rate of 84.5 cents per 100 pounds, Clovis, Cal., to Coatesville, Pa.	859.37		
	<hr/>		
	873.37	War tax	\$26.20
<i>Against these charges we credit net proceeds of sale, \$758.66, applied</i>	736.38	“ “	22.28
	<hr/>		
Leaving unpaid balance of	136.99	“ “	3.92
Additional charges accrued are:			
at Coatesville	130.00	“ “	3.90
PRR at Coatesville	110.00	“ “	3.30
PRR unloading at Coatesville	7.63	“ “	.23
PRR Storage at Coatesville	1290.00		
	<hr/>		
Total to be collected			
\$1,685.97	\$1674.62	“ “	11.35

The correct and proper course was to credit the proceeds against the freight charges which had accrued first and were the earliest charges. This natural course the plaintiff followed. It applied these proceeds as they should be applied. *It even stipulated at the trial that this was the way these proceeds had been applied* (Trans. p. 27), and now for the first time it is claiming that this method of application was wrong. This method was right and plaintiff's former acts show that it considered this method of application the correct one. Furthermore having applied this payment in this way it is bound thereby and cannot for the first time on appeal claim a different application.

The decision of the lower court, after holding that the defendant was not liable for storage accrued after January 8, 1919 under the new arrangement between Humphrey Co., and plaintiff said: "it is assumed the parties can segregate the proper items for entry in the judgment". Accordingly the parties computed the amount of the judgment in accordance with the decision. In so computing the judgment both parties agreed to the application of the proceeds of the sale to the freight charges. The plaintiff not only in its own accounting but in computing the judgment adopted this method as the correct one but now it claims it was the incorrect one but assigns no reasons therefor. A court will not interfere with an application of payment made by the parties and in making such application it will consider first the intention of

the parties if such intention is manifest. 2 *Amer. & Eng. Ency. of Law*, p. 447. Now in this case the plaintiff as creditor applied this payment, when received, to the freight. The plaintiff's accounts show that. The account which is quoted by us says: "against these charges (the freight) we credit net proceeds of sale \$758.66 applied". No clearer manifestation of intention to so apply this payment could be shown. As we have seen the court will not interfere with the application particularly when this was the intention of the parties.

However, not only in plaintiff's accounts were the proceeds of the sale of the ore applied against the freight but also plaintiff so applied it at the time of making up the judgment indicating more than ever that this was the proper application of the payment and that it was the intention of the parties that it should be so applied. We submit under the circumstances that now it is too late to change such an application even if plaintiff was entitled to apply these proceeds in some other way. Plaintiff is not, however, entitled to make any different application. It is an elemental rule that payments are applied upon the oldest items of the account.

See: Section 1479 of the ~~Code of Civil Procedure~~ *Code* of the State of California;

Coulter v. Hurst, 97 Cal. 290;

2 *Amer. & Eng. Ency. of Law*, 461;

Wendt v. Ross, 33 Cal. 650.

The freight and demurrage charges were the earliest items of the account chargeable against this ore and these proceeds should be applied toward their payment in accordance with the foregoing rule. In fact plaintiff by so doing in the first instance admits that this was the proper rule to follow.

Furthermore the railroad had two liens on these goods. First, the lien for the freight charges arising out of its acts as carrier. Secondly, the lien for storage charges arising from its acts as warehouseman. The lien for the freight charges was the first and paramount one and the proceeds of the sale should be first applied in discharge of this lien.

Again while defendant as between the railroad and himself was liable for freight charges Humphrey & Co., the owner of the goods, was the one ultimately liable to the defendant for the freight charges if the defendant should pay it. Accordingly as between Humphrey and the defendant the defendant was surety and Humphrey was principal. Now if the defendant had paid the freight and terminal charges but not the storage charges he would have immediately become subrogated to the railroad's lien on these goods for the freight. "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor." Section 2849 Civil Code of California.

Accordingly if the defendant had paid the freight charges it would have been subrogated to the lien on these goods for the freight, could have caused this sale and could have used the proceeds to reimburse him for his payment of the freight. Therefore the goods having been sold by the railroad the defendant as surety is entitled to the benefit of the proceeds thereof and is entitled to have them applied on the obligation on which he is surety. As we have said the lien for freight was the paramount lien and the defendant as surety is entitled to have this lien discharged from the proceeds of the sale before the lien for the storage charges, which is a subsequent lien, can be discharged.

Accordingly we submit that the application of the proceeds of this sale originally made by the plaintiff, adhered to by it in its statement of facts and in computing the judgment in the lower court was the correct one, that this application cannot now be modified or changed, that the proceeds of this sale should be applied, first to discharge the lien for the freight before applied in any respect upon the lien for the storage and that this was what was done and that the judgment in this respect should not be modified.

Dated, San Francisco,
November 7, 1923.

Respectfully submitted,
KEYES & ERSKINE,
Attorneys for Defendant in Error.

No. 4028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, Director General of Railroads, as Agent, pursuant to Section 211, Transportation Act, 1920,

Plaintiff in Error,

vs.

R. D. ADAMS,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the United States Circuit Court of Appeals,
for the Ninth Circuit.

P. H. JOHNSON,

Attorney for Plaintiff in Error.

JAMES E. GOWEN,

Of Counsel.

FILED

NOV 7 1923

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Upon Writ of Error to the United States Circuit Court of Appeals,
for the Ninth Circuit.

There are just two propositions, which defendant in error has sandwiched into his argument about "custom and method", "liability of warehouseman", "marshalling of assets", "liens on goods" and "subrogation" (all of which we contend are entirely immaterial and foreign to the question before the Court) that we deem necessary to consider especially in our closing brief. And those two propositions are:

I.

That the storage charges in question arose by virtue of a special contract with E. C. Humphreys Company; and,

II.

That said storage charges were not incidental to "freight charge".

First Proposition.

Defendant in error has wandered mentally far afield on both these propositions.

As to the first, of course, there is no evidence in the record which would justify the Court in taking any such stand. All the talk about "custom and method" of the E. C. Humphreys Company, and how it handled two other cars of chrome ore, has nothing at all to do with the transportation charges which we now seek to collect from the defendant in error, because the plaintiff in error ever looked to the defendant in error, who was at all times primarily liable for all the transportation charges in connection with this shipment, and there is no evidence here of any special contract by which the plaintiff in error agreed to release Adams and look to the E. C. Humphreys Company for the transportation charges, or any portion thereof; and because the evidence is conclusive that plaintiff in error had no knowledge or information of any kind whatever of any arrangement between Adams and the E. C. Humphreys Company, or of the issuance and payment of the draft mentioned. (Tr. "X" p. 27.)

True, defendant in error complains about our mention of this fact, saying:

“Counsel in his brief keeps referring to the lack of knowledge of the plaintiff of the transaction between Humphreys Company and Adams”;

and that

“The paragraph in the stipulation stating that it had no knowledge *obviously* means that it had no knowledge prior to January 8, 1919.”

But it seems very clear to us that the paragraph in question means just what it says:

“That the said plaintiff herein had no knowledge or information of any kind whatever of any arrangement between the defendant, R. D. Adams, and the E. C. Humphreys Company or of the issuance and payment of the draft mentioned and set out in paragraph IX hereof.”

It seems to be couched in ordinary English words with no hidden meaning at all and we take it that “no knowledge” means no knowledge and if it did not mean that, then defendant in error should have placed his construction on this paragraph before it went into the admitted statement of facts.

Is it a novel construction to contend that the English language is entirely adequate when applied to paragraph “VII” of the admitted statement of facts and entirely lacking in expressive force when applied to paragraph “X” of the same document?

But, aside from this, there is an uncomfortable dearth of evidence in the record of any special con-

tract which would prevent the plaintiff in error in this case from electing to look to, and collect from the party whose duty it was to pay.

Second Proposition.

The answer to the second proposition is a reference to the first brief of plaintiff in error and the cases cited therein, among others, the *Dettlebach* case, 239 U. S. 453 at 457; the *Lehigh* case, 188 Fed. 879 at 885-6; and the *Timmons ville* case, 258 Fed. 470 at 472-4—pages 23, 24, 25 and 26 of opening brief.

There it is held that “transportation” embraces all services in connection with a shipment, including storage of goods after arrival at destination.

A reading of the above authorities seems clearly to settle this proposition adversely to defendant in error.

And, if defendant in error feels that he is being overcharged or that “equity is not being done”, as is contended in his brief, then we say there has been provided a way for him to protect his rights in such case, to-wit, an application first to the Interstate Commerce Commission for his relief, as this Court is without jurisdiction to consider that question here, and we refer again, in this connection, to the cases cited in our opening brief on page 29 thereof.

Admissions on Part of Defendant in Error.

In his brief defendant in error admits:

1. That, as shipper and consignor of this chrome ore, defendant in error has always been liable for freight charges thereon. (Defendant's Brief, page 6.)

2. That the word "transportation" includes all services incidental to the handling of freight, including storage. (Defendant's Brief, page 8.)

3. "That, while there is very little authority on this question, the cases which we have found, *which are at all in point*, sustain this position." (Defendant's Brief, page 10.)

4. That his authorities are "somewhat in point". (Defendant's Brief, page 13.)

5. That defendant in error was "technically liable to pay the freight because he was shipper". (Defendant's Brief, page 16.)

While we consider it the duty of attorneys presenting appeals to this Court, to always blaze the way to a rightful conclusion and to assist the Court to sift out the chaff from the wheat, yet it is clear in this case that it would be a reflection upon the intelligence of the Court were we to undertake to elucidate those matters contained in the brief of defendant in error, which are already clear and plain.

The court must necessarily read the brief of defendant in error and *to read it is to answer it*.

Without any implication of absurdity or any display of egotism whatever, we earnestly contend *that defendant in error has admitted himself out of Court* and we now ask that his admissions be confirmed; that the judgment of the District Court of the United States, in and for the Northern District of California, Second Division, be reversed and that said cause may be remanded to said Court, with instructions to enter judgment for the plaintiff in error in accordance with the prayer of said amended complaint.

Dated, San Francisco,
November 26, 1923.

Respectfully submitted,

P. H. JOHNSON,

Attorney for Plaintiff in Error.

JAMES E. GOWEN,
Of Counsel.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

DOMINIC CONSTANTINE MONTAGUE,
Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States Dis-
trict Court for the District of Idaho,
Northern Division.*



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*Upon Writ of Error from the United States Dis-
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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

W. B. McFARLAND,
Coeur d'Alene, Idaho,

NEIL C. BARDSLEY,
SPOKANE, WASHINGTON,
Attorneys for Plaintiff in Error.

E. G. DAVIS,
U. S. Attorney,

McKEEN F. MORROW,
Assistant U. S. Attorney,
Boise, Idaho.
Attorneys for Defendant in Error.

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*In the District Court of the United States in and
for the District of Idaho, Northern Division.*

UNITED STATES OF AMERICA,

vs.

DOMINIC CONSTANTINE,

Defendant.

No. 1627.

INDICTMENT.

Charge: Unlawfully dispensing
narcotics. Violation Act of De-
cember 17, 1914.

The Grand Jurors of the United States of Amer-
ica, being first duly impaneled and sworn, within
and for the District of Idaho, Northern Division,
in the name and by the authority of the United
States of America, upon their oaths do find and
present:

That heretofore, to-wit: On or about the 6th
day of April, A. D. 1921, at Colburn, in Bonner
County, Idaho, and in the Northern Division of the
District of Idaho, Dominic Constantine did then
and there deal in, dispense, sell and distribute cer-
tain compounds and derivatives of opium and coca
leaves, to-wit, morphine sulphate and cocaine hy-
drochloride, without first having registered with
the Collector of Internal Revenue for the District

of Idaho his name and place of business and place or places where such business was to be carried on, as required by law.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. L. McCLEAR,
*United States Attorney for the
District of Idaho.*

T. J. MORROW,
*Foreman of the United States
Grand..Jury.*

WITNESSES EXAMINED BEFORE THE
GRAND JURY IN THE ABOVE CASE:

H. T. Holtz
H. W. Coltz

Endorsed, Filed May 24, 1921,
W. D. McREYNOLDS, Clerk.

At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Tuesday, July 11, 1922, and other dates as stated, the following proceedings, among others, were had, to-wit:—

Present:—

HON. E. S. FARRINGTON, District Judge.

United States of America,) MINUTE
 vs.) ENTRY.
Dominic Constantine,) Criminal No. 1627.
 Defendant.)

Comes now the District Attorney and the defendant into Court, the defendant to be arraigned upon the indictment. The indictment was read to the defendant by the Clerk, whereupon the Court asked the defendant if the name by which he was indicted was his true name, and the defendant replied in the affirmative.

The Court asked the defendant if he pleads guilty or not guilty of the offense charged in the indictment, and the defendant pleaded not guilty.

Before the Honorable Frank S. Dietrich, Judge.
November 27, 1922.

Comes now the District Attorney with the defendant and his counsel into Court, whereupon the defendant's plea was withdrawn and a demurrer to the indictment was filed and argued before the Court by respective counsel. The Court overruled the demurrer allowing the defendant exceptions to the order.

The defendant was then asked if his plea be guilty or not guilty of the offenses charged in the indictment and the defendant pleaded not guilty. The cause then came on for trial before the Court and a jury, McKeen F. Morrow, Assistant District

Attorney, appearing for the United States, and Neil C. Bardsley, Esq., appearing for the defendant, who was also present. The defendant announced that his true name was Dominic Constantine Montague and it was ordered that further proceedings be had under the true name of the defendant.

* * * * *

(Title of Court and Cause.)

No. 1627.

VERDICT.

We, the jury in the above entitled cause, find the defendant guilty as charged in the indictment.

ARTHUR E. FRANKLIN,

Foreman.

Endorsed, Filed Nov. 27, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 1627.

JUDGMENT.

Convicted of

Unlawful dispensing of narcotics
violation Act of December 17,

1914.

NOW, on this 4th day of December, 1922, the United States District Attorney, with the defendant and his counsel, Neil C. Bardsley, Esq., came into Court; the defendant was duly informed by

the Court of the nature of the indictment found against him for the crime of unlawful dispensing of narcotics, committed on the 6th day of April, A. D. 1921, of his arraignment and plea of Not Guilty as charged in the indictment, of his trial and the verdict of the jury, on the 27th day of November, A. D. 1922, "Guilty as charged in the indictment." The defendant was then asked by the Court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendant having been convicted of the crime of unlawful dispensing of narcotics,

It is hereby considered and adjudged that the said defendant, Dominic Constantine Montague, be imprisoned and kept in the U. S. Penitentiary at Leavenworth, Kansas, for the term of Eighteen months, and it is further ordered and adjudged that said defendant be and is hereby remanded to the custody of the United States Marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

(Title of Court and Cause.)

No. 1627.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above entitled

cause came on regularly for trial, in the above Court, on the 27th day of November, 1922, at Coeur d'Alene, Idaho, in the above entitled Court, before the Hon. Frank S. Dietrich, the judge thereof, and upon the demurrer interposed to the indictment returned in said cause, which said demurrer was as follows:

Comes now the defendant, Dominic Constantine Montague, and demurs to the information in the above entitled case on the following grounds:

1.

That the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the jurisdiction of such district.

2.

That it does not substantially conform to the requirements, the form, and the certainty required of indictments.

3.

That more than one offense is charged in the indictment.

4.

That the facts stated do not constitute a public offense.

5.

That the indictment contains insufficient statements as to constitute a crime.

That upon an argument being had, the said demurrer was by the Court overruled and an exception to said ruling allowed to said defendant. That

thereafter and on the 27th day of November, 1922, said cause came on regularly for trial before the Hon. Frank S. Dietrich, the judge thereof, and a jury being impaneled, McKeen F. Morrow, Esq., Assistant United States Attorney, appearing as counsel for the plaintiff, and Neil C. Bardsley, Esq., appearing as counsel for the defendant. Whereupon the following proceedings were had, to-wit:

MR. MORROW: May it please the Court, gentlemen of the jury, the indictment in this case is as follows: (Reading indictment to jury).

The government will produce witnesses before you to show,—and I might outline the testimony very briefly, so that you can have it in mind as the witnesses are called,—that about midnight, or possibly a little after midnight, on the night of April 5th, 1921, a Great Northern freight train was stopped at Colburn, Idaho, on the other side of Sandpoint. The train was going west, and special agent Harry T. Holtz, who was on the train, as special agent of the Great Northern Railway Company, was coming along the train, checking the freight cars to see whether anybody was in any of these cars, and he noticed a car door that wasn't sealed; and he had a flash-light, and he saw two men in there, or rather, a man, and a boy about thirteen years old. He said something to them, and the man came up and said, "I am a railroad brakeman," and handed him his card, which was the card of Dominic Constantine.

MR. BARDSLEY: I object to any statement as to what the card showed.

MR. MORROW: In any event, the defendant, the party in the car came to the door, and the agent noticed something in the back of the car, a pack-sack or something of that sort, and he directed the man to bring the pack-sack. He had seen that with the flash-light. The agent was standing on the ground, and the man brought the pack-sack and dumped it down in front of him. And at that particular moment the agent recognized the man as Dominic Constantine, as he had had previous experience with him. And just at the moment he set the sack down in front of him he turned and gave a jump and went out of the door on the other side of the car, and it was night, and he escaped. In the pack sack was found a large quantity of morphine and cocaine, morphine sulphate and cocaine hydrochloride, which was turned over to the federal authorities at Spokane some time on that same day,—that is, this was shortly after midnight, and it was turned over to the federal authorities, narcotic agents, on the 6th.

The evidence will further show, by two witnesses, that the defendant Dominic Constantine was seen near this same freight train the afternoon of April 5th, at Troy, Montana, and that shortly after the arrival of the train that morning at Hillyard, Washington, another witness, who knew the defendant by reason of the fact that he

had been a brakeman on the Great Northern Railway, recognized the defendant coming down through the streets of Hillyard, Washington. Evidently or apparently he had caught the same freight out, in another place; he had disappeared into the woods, or they couldn't locate him after he made this break from the car.

We will further show you the analysis of these drugs, and the testimony in regard to that, and further testimony will—probably you can follow it as it comes in.

MR. BARDSLEY: If the Court pleases, at this time I wish to move, upon the statement of the prosecutor, that the defendant be discharged. The charge in this indictment is that the defendant did then and there deal in, dispense, sell, and distribute certain compounds, and under the statement of the prosecutor there is no testimony to that effect. They merely found a bag, and in this bag was some morphine, and it is not sufficient. The defendant is not confronted with any such charge in this information. That is a charge of possession.

THE COURT: Well, I am not inclined to hold counsel to strict responsibility for insufficiency of statement. It may be that ultimately your position will turn out to be correct, and if the plaintiff proves no more than is suggested it may be that that will have to be the result. However, it isn't necessary to show by direct evidence that one was engaged in selling or dispensing drugs. That may

sometimes appear from the circumstances of the case; so I think I shall wait and see what the circumstances are, before determining whether or not it is a case that may go to the jury under the charge laid in the indictment.

H. T. HOLTZ, was produced as a witness on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MORROW:

“I have been employed for the last several years as a Special Agent for the Great Northern Railway in the District between Spokane and Troy, Montana. I was with a freight train on the night of the 5th, and morning of the 6th of April, 1921, coming from Troy, Montana, to Spokane. We headed in that side track at Coburn, Idaho, for a passenger train, and while we were waiting, I walked up alongside the train, to look over the cars and see if they were all right, and when I got within about ten or twelve cars of the head end of the train, I found a car door that was closed and had no seal on it, and I stuck the car door open.”

The examination continued as follows:

Q. About what time of night was this?

A. That was between one and one-thirty in the morning of April 6th, right after midnight.

Q. What light, if any, did you have?

A. I had a flash light.

Q. What did you see when you threw the car door open?

A. I saw a man and a young lad and a bundle, looked like a pack sack.

Q. What did you do then?

A. I asked them where they were going, and this man spoke up and said he was going to Spokane. I says, "Here's a good place to get out and start walking." He walked over toward the door. I had the flash light on him, and he walked over towards the door and pulled out his bill fold and says, "I am a brakeman," and he handed me the bill fold.

MR. BARDSLEY: Have you that bill fold now?

A. No, I haven't.

MR. BARDSLEY: I object to any testimony as to what was upon that and what it contained.

THE COURT: Well, were you going to seek testimony as to its contents?

MR. MORROW: If counsel desires it for the record, I will ask the question—

THE COURT: Did you see the bill fold?

A. Yes, sir; I had it in my hand.

THE COURT: Did you take it?

A. He handed it to me.

THE COURT: What did you do with it?

A. Read the name on it and handed it back to him.

THE COURT: And that is the last you have seen of it?

A. Yes, sir.

THE COURT: The objection is overruled.

MR. BARDSLEY: If the Court please, my reason for objecting to this would be compelling the introduction of evidence against this defendant which we have no way of contradicting. This man might have been mistaken in reading that. We are entitled to the best evidence.

THE COURT: The general rule is that where a writing is presumably or prima facie in the possession of the defendant, the Government cannot call for it, because that would be the compelling of your evidence itself. Therefore secondary evidence may be resorted to. You may proceed.

MR. MORROW: Q. What was the contents of this bill fold that you read?

A. It contained a brakeman's card. On the card was "Dominic Constantine, Kalispel Division, Great Northern Railway, brakeman."

Q. How was the word "Constantine" spelled on that?

A. I couldn't say just how it was spelled now. I have seen it spelled two or three different ways since and before that time.

Q. And what was next said between you and this man?

A. I says, "If you are a brakeman there is no need of your riding up here in this car. Why don't

you get in the caboose. Go on back and get that pack sack and get out.”

Q. What did the defendant do?

A. He went back and got the pack sack and brought it out and set it down in front of me in the car door, and as he set it down he turned and jumped out of the car on the other side. The door war open.

Q. Did you recognize this man at any time after you saw this card?

A. Yes, sir.

Q. When?

A. At the time he set the pack sack down.

Q. Who did you recognize him as?

A. Dominic Constantine, Great Northern brake-man.

Q. Have you seen him since?

A. Yes, sir.

Q. Where?

A. I saw him at the hearing in the Federal Court at Spokane.

Q. Have you seen him since that time?

A. Not outside of today.

Q. Is he in the court room at the present time?

A. Yes, sir.

Q. Just state to the jury where he is sitting, this man?

A. He is sitting at the side of his attorney there in front of me.

Q. Which door did he jump out of?

A. He jumped out of the door on the opposite side from where I was. I don't know whether that is north or south, but we would call it north, the way the railroad runs.

Q. It was the opposite side of you?

A. I had my hand on my gun, and I shot up through the car roof and hollered for him to stop, and I ducked underneath on the other side and shot two or three more times, and hollered for him to stop, but all I could hear was him going through the brush.

Q. Then what did you do?

A. I went back and took the pack sack and took it up on the engine and unlocked it and examined the contents.

MR. BARDSLEY: I object to that testimony. Did you have a search warrant?

A. No, sir.

MR. BARDSLEY: Was there a Government officer there with you?

A. No, sir.

MR. BARDSLEY: I object to the testimony of this witness as to any contents of this. It is contrary to constitutional provisions prohibiting search and seizure without a warrant.

THE COURT: Overruled.

MR. BARDSLEY: Is it necessary for me to take exceptions? I don't know whether it is or not. May I have exceptions to the rulings?

THE COURT: It will be understood that you have exceptions to all adverse rulings.

MR. MORROW: Q. Handing you an article, I will ask you to state what it is.

A. A pack sack.

Q. Is there any way in which you can identify it with the pack sack to which you have just referred?

A. I put my mark on there in green ink.

Q. What is that mark?

A. My initial.

Q. "H"?

A. "H".

MR. MORROW: We will ask to have this marked as Government's Exhibit 1.

"There was a quantity of morphine and cocaine in the pack sack—the bottles were marked that. There was a grip in the pack sack."

And thereupon a certain grip was shown the witness who then testified as follows:

"That is the grip that was in the pack sack."
"This handle wasn't on here at that time. You couldn't carry it with that thing. I had a strap on here, a kind of rawhide wore out, and it broke as I was carrying it, because it was too heavy. The bottles I refer to were inside the grip."

Said grip was thereupon marked, Plaintiff's Exhibit No. 2. The witness continued:

"I took the pack sack and the grip and its contents up on the engine, where the engineer and

fireman were, and opened it up and examined it, and brought it into Spokane, and turned it over to Mr. Fred Watt, United States Department of Justice in the Federal Building, at Spokane. This black bag and its contents were in my custody during the balance of the time, from the time I was at Colburn until I got to Spokane, and delivered it to Mr. Watt. It was right after dinner, if I remember right, that I took it up to Mr. Watt on the 6th day of April."

MR. MORROW: "We offer in evidence, Exhibits 1 and 2."

MR. BARDSLEY: "Did I understand you are just offering the grip and the pack sack?"

MR. MORROW: "At the present time, yes."

The witness continued:

"The bottles I have referred to were still in the grip when I delivered it to Mr. Watt. I initialed some of those bottles at the time I took them up to Mr. Watts' office, if I remember right, either there or just before I took them up."

MR. MORROW: Q. "Handing you a bottle, I will ask you to state if your initials are on there?"

A. "Yes, sir; they are. 'H. T. H.' right there."

Said bottle was marked Plaintiff's Exhibit No. 3, and another bottle marked Exhibit No. 4.

The witness then continued:

"The bottle marked Plaintiff's Exhibit No. 4 has my initials 'H. T. H.' right there. The other bottles were similar in general appearance to the

ones I have just identified as Government's Exhibits 3 and 4. They were cocaine. I counted the bottles there was 8 bottles of morphine and 32 bottles of cocaine."

Upon cross examination by Mr. Bardsley, the witness testified as follows:

Q. This was about what time of night?

A. About, after one o'clock, between one and one-thirty.

Q. You were alone?

A. I was alone, yes.

Q. No one with you?

A. No one with me at the time.

Q. Where was Mr. Cole?

A. I don't know where he was.

Q. There wasn't a Government official there with you?

A. No, sir.

Q. Now, as I understand your testimony, you found a car which was unlocked?

A. Yes, sir.

Q. And went to the door and looked in?

A. Yes, sir.

Q. And in that car there was a man and a boy?

A. Yes, sir.

Q. And you told them to come out?

A. Yes, sir.

Q. And they started to come out?

A. Yes.

Q. And as they were coming out you noticed a pack sack back in the car?

A. Well, he came out with a pack sack, when he came out.

Q. Did he come out with a pack sack?

A. Yes, because I sent him back after it.

Q. When he came out, the man got up and came out?

A. He came to the door.

Q. And then you saw a pack sack back there?

A. Yes.

Q. And then you sent him back after the pack sack?

A. Yes, sir.

Q. Then he brought it out?

A. Yes, sir.

Q. At the time you sent him back for the pack sack did this man say anything to you?

A. Yes.

Q. What did he say?

MR. MORROW: That is objected to as hearsay.

THE COURT: Overruled.

A. He said, "I'm a brakeman."

Q. Did he say anything about the pack sack?

A. He said he didn't own it, didn't have any pack sack.

Q. You testified to that before Judge Rudkin?

A. I believe I did.

Q. And when you opened the door who was near this pack sack,—the boy or the man?

A. They were both up at one end of the car, and the pack sack was up in that end of the car.

Q. The boy was laying on the pack sack, was he not?

A. I couldn't say as to that.

Q. You don't remember that?

A. No, sir.

Q. Do you remember testifying to that fact before Judge Rudkin?

A. I don't remember of it. He may have been sitting on the pack sack. There was only about three feet between the side walls of the car and the pack sack on one side. It would be pretty close to the—

Q. This was a dark night?

A. Dark night—One or one-thirty in the morning.

Q. And how long were you there at that door?

A. Oh, just—I wouldn't say over a minute or a minute and a half or two minutes.

Q. A very short time?

A. A very short time, yes.

MR. BARDSLEY: That is all.

On re-direct examination by Mr. Morrow, the witness testified as follows:

“The boy there in the car was just a small kid, weigh about 100 pounds, about 13 or 14 years old, —some little runt that had run away from home, I guess. I did not observe any tags or marks on the pack sack. Not any more, than I put my mark on

there with green ink, and I know that is the pack sack. The grip had a lap on it on the side, with a couple of holes punched through it,—looked like the identification tag had been taken off from it. I remember that distinctly. Those two holes in Exhibit 2 are the ones I refer to.”

Thereupon

ED. THOMPSON, produced as a witness on behalf of the Government, being first duly sworn, testified as follows:

“I am a Special Agent for the Great Northern. I came into Troy, Montana, the evening of the 5th of April, 1921, in charge of a freight train. Mr. Stickney was with me. We got into Troy about 5:30 Montana time. I had been in the employ of the Great Northern about eight years prior to that time. I knew of the defendant, Dominic Constantine, that is, I had seen him, knew him when I saw him, was all. We turned the freight train over to Special Agents Holtz and Weigner. I saw a man about 10 or 12 car lengths away. I couldn't swear to any of it, as far as—I was too far away. I saw a man with a grip. It was broad daylight, 5:30 Montana time. It was a black grip. He was a man that answered to Constantine's description very well. He was walking away from me. I didn't see his face. He went up along side the train, went up towards town, and we tied up on

the main line there in Troy, and we stayed right with the caboose; we didn't go up."

Thereupon,

M. L. STICKNEY, produced as a witness on behalf of the Government, being first duly sworn, testified as follows:

"I was in the employ of the Great Northern Railway in April, 1921, and came into Troy, Montana, with a freight train on the evening of April 5, 1921. Special Agent Thompson was in charge of that train with me. We arrived about 6:30 Montana time. When we stopped at the east switch I got out of the caboose. We had a car of liquor we were taking into Vancouver, B. C., and we were protecting that car, and I think it was 12 or 14 cars from the caboose, and I saw this short, stout, stocky man jump out of a car with a black grip, and I didn't want to leave this car down there in that section of the yard, so I asked Thompson, and we both watched him, and he passed over a bridge going into the Troy yard. When I got into the Troy yard, at the depot, I met Special Agents Holz and Weigner, and I described this fellow to him, there in the yard at the depot, when I met them, I was 12 or 14 cars from this man when I first saw him. I never had known Dominic Constantine. The man I saw was a short, stocky man, with a black grip. I do not know when the freight train pulled out of

Troy. I went to bed as soon as I got into Troy; and I didn't hear of it until I got to Spokane next morning."

Thereupon,

WILLIAM DeLONG, produced as a witness on behalf of the Government, being first duly sworn, testified as follows:

"I reside at Hillyard, Washington, and in April, 1921, was employed by the Great Northern Railway, as yard clerk there. I had known Dominic Constantine before I went there in June, 1919. I saw him at Hillyard the morning of April 6, 1921, about 7:15 or 7:30, going South on Harrison St. This was 6 or 7 blocks from the yard office. It was the defendant sitting here at the table that I saw at that time. That train came in shortly after six o'clock and I went off shift at 7 o'clock. This morning before I went home, the watchman of the yard had told me what Mr. Holz had found along the freight train; he had found a brakeman with some dope or booze or something; and I had known this fellow, worked with him at Whitefish, and as I was going home, he was right ahead of me. I don't remember anything in particular that happened April 5th or 7th. I went to work at 11 p. m. of the 6th and when I went on shift the boys sat around there talking about this particular case. The train that he was supposed to come in on was

extra 3051, I believe. It got in around 6:30. I believe it was Watchman Boyce that I talked with that morning; I won't say for sure. He checks the seals in and out of the yard on high class merchandise and watches the yards in general. He told me of it about 6:45 or 6:50. He just came to the office and was telling the story, not alone to me, but to the men in the office, that they had found a large amount of cocaine or booze,—I don't just exactly know which now. That morning I saw this defendant on the streets of Hillyard, and that is the way I have of fixing the date."

Thereupon,

WILLIAM H. PRATT, produced as a witness on behalf of the Government, testified as follows:

"I am a special agent of the Great Northern Railway, and was in that employ in the winter and spring of 1921, stationed at Spokane. I had known Dominic Constantine a little over a year in the spring of 1921. I have seen the grip Plaintiff's Exhibit No. 2, before. I saw it in Dominic Constantine's possession about a month previous to the time that Mr. Holtz got these narcotics in it. I was at Hillyard, Washington, at 7:05 in the morning about a month previous to that when train No. 1 pulled in and Constantine stepped off of the train. I got on the train, on the head end of the smoking car and he followed me in, and I

passed this grip. I didn't pay any particular attention to it at the time, but he followed me in and picked it up and went out, and I followed him out. I got close enough to him so that I would know the grip if I would see it again. Those two holes in the flap is the one particular mark that I remember. The man who had this grip is the defendant in the Court room now. The grip isn't in the same condition now. It hasn't got the same handle on it. It is a different handle. I was on the platform when he got off the train. I got on the train and he followed me in and picked that grip up. I saw it sitting on the first seat on the right hand side as I went in the smoking car. I followed him out and looked at the grip as he came out. I didn't take it away from him. I didn't have any right to. I had an interest in looking at it because I knew he had been arrested before, and I was an officer, a special deputy sheriff of Spokane County for the Great Northern.

Thereupon,

FRED A. WATT, produced as a witness in behalf of the Government being first duly sworn, testified as follows:

"I am a special agent of the Department of Justice stationed at Spokane, in 1920 and 1921. During the spring of 1921, Mr. Harry Holz of the G. N. Railway Co., delivered to me a grip containing some

narcotics. That was about the 6th of April. Max Wasson was there in the office with me in the Federal Building, at the time he brought the stuff in and also the stenographer Pritchard. Plaintiff's Exhibit No. 2, looks like the grip with a new handle on it. There were about 40 bottles in the grip, 32 I believe were marked morphine, and 8 marked cocaine. They had printed labels on them. I did not mark them. I do not know as there is any way of identifying the particular bottles, but all of these bottles were similar to Plaintiff's Exhibits 3 and 4. I took possession of them and kept them in the cage, the iron cage. It is locked with a padlock, and a Yale lock, a heavy Yale lock. The cage was in my office. I turned them over to Mr. Gatons about three months later. I know Mr. Harold W. Cole. The day that Holz brought these in, Mr. Cole came down there and we opened the grip—I believe Lou Watts was with him—and we opened the grip and counted the bottles. Harold Cole was a narcotic agent of the Government and Lou Watts was also a narcotic agent. I counted the bottles with them. I think Mr. Cole came back and got four bottles after that, between that time and the time I delivered them to Mr. Gatons. I think it was sometime in May. I think the four bottles referred to had been returned before the bottles were turned over to Mr. Gatons. That was early in July. No one else has access to that vault. There are only two keys to the vault, so far as I know,

and I had both of them, carried them in my pocket all the time. That was in July, 1921. The occasion of my turning the bottles over to Mr. Gatons was that I was going to have the cage torn out, taken out of the office, so that I would have no place to to keep them.

Thereupon,

MR. HAROLD W. COLE, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

“I am a federal narcotic agent, and have been in that occupation about five years. About the 6th of April, in Mr. Fred Watt’s office in Spokane, I counted the bottles of a quantity of morphine and cocaine. Mr. Watt, Mr. Wasson and Mr. Lewis Watts, the narcotic agent I was working with at the time, were there. I believe I initialed 3 or 4 bottles at that time. My initials are on plaintiff’s exhibit 3 and 4, and the date. They were placed there April 6, 1921. I counted them at that time and left them with Mr. Watt. There were 32 ounces of cocaine and 8 ounces of morphine, each bottle was marked with the manufacturer’s label, cocaine and morphine. There were no revenue stamps of any kind on the bottles. About a month later, in preparing to present the case to the Grand Jury, I secured two or four of the bottles, those that I had initialed and brought them here to

Coeur d'Alene, to appear before the Grand Jury, in the indictment of this case. I took these bottles to a drug store here in Coeur d'Alene. I am a graduate of the College of Pharmacy, and served ten years as a prescription clerk, and five years of this work, and have made tests of cocaine and morphine a great many times.

During the 5 years I have been employed as a narcotic agent I have made tests of narcotics as a witness in a great many cases. I opened two of the bottles, one morphine and one cocaine, and tested them, and found them to be what they were labeled, morphine and cocaine. I didn't open every bottle and weigh it, but it was approximately 32 ounces of cocaine and 8 ounces of morphine. I am referring to cocaine hydrochloride as cocaine, and morphine sulphate as morphine. Exhibits 3 and 4, are the bottles I tested.

Whereupon, Exhibits 3 and 4 were offered in evidence and admitted. The witness continued:

“After I appeared before the Grand Jury, I returned to Spokane and gave these bottles back to Mr. Fred Watt. I took the grip or package out of the vault, and I put them in the grip and he put them back in the cage—not the vault—the cage. I again saw these two bottles and the other 38 when I accepted them from Mr. Gatons in the vault at the Exchange National Bank in Spokane, the whole forty bottles. I took them with me to Boise, Idaho, and put them in the vault there. I later took them

out of that vault and packed them with, Oh, probably evidence in twenty other cases, perhaps more, and send them to Denver to Mr. Williamson, Agent in Charge. That was shortly before the first of March this year, 1922.

Whereupon, the witness examined the contents of a suit case in the Court room, and stated that the bottles therein were the bottles referred to, that he took from Spokane, to Boise, and shipped to Denver.

The witness then continued:

“The current value per ounce in Spokane and vicinity and in the vicinity of Colburn, Idaho, in April, 1921, would be about \$12.00 for the morphine and the cocaine about \$10.00 an ounce. That is legitimate sales, possession of narcotics would be in the hands of druggists and doctors and sold legitimately on narcotic forms. The current price in illegitimate sales or the bootleg price in Northern Idaho, locality at that time was about \$50.00 per ounce, for cocaine and \$60.00 for morphine. The business is done by the smuggler or importer and sold to the wholesaler, and the wholesaler to the retailer, and to the user. And the smuggler or importer, I can't give a fair estimate as to the value to him, that is, the amount he would have to pay, but I do know the value that the retailer would pay the wholesaler or smuggler. That is \$50.00 an ounce buying in ounce lots for cocaine and \$60.00 for morphine. Then the sale, of course, by the re-

tailer to the consumer, there are enormous profits in it. I mean where it is sold in bindles, by the grain, there would be about 400 bindles in a bottle and each bindle would sell for a dollar.

There is a manufacturer's label on each bottle. I knew, of course, what that was—manufactured by Smith, of England, the morphine, and McKess & Robbins, of New York, the cocaine. Some addicts use both morphine and cocaine, and some use only one. The average addict must use four or five in the minimum amount of morphine a day and there is no limit to the amount of cocaine that could be used by an addict, and the maximum of morphine would probably be fifty grains a day, that would be \$50.00, but that would be very unusual, that would be fifty bindles, but that would be very unusual. The average addict we find on the street, who would be purchasing this, would spend from five to ten dollars a way. So an ounce bottle would last the ordinary addict forty days at least.

And thereupon,

ALBERT E. GATONS, produced as a witness on behalf of the Government, being first duly sworn, testified as follows:

“I am a federal narcotic agent, and I have been in that employment in the Spokane District since June 28, 1921. As soon as I secured my safety deposit box the early part of July. The bottles here,

Plaintiff's Exhibits 3 and 4, and the other 38 bottles which are in the suit case were turned over to me by Agent Fred Watt of the Department of Justice. That was the early part of July, 1921. I put it into my safety deposit vault at the Exchange National Bank of Spokane. It was kept there by me for safe keeping until approximately the finish of the September term of Court, when I turned it over to Mr. Cole, who took it to Idaho with him. That would be the fall term of Court, 1921. No one else had access to that safety deposit box. The entire forty bottles, 32 ounces of cocaine, and 8 of morphine, were placed in my possession by Mr. Watt and turned over by me to Mr. Cole.

MR. L. R. WATTS, produced as a witness on behalf of the Government, being first duly sworn, testified as follows:

"I am a federal narcotic agent and was working in Spokane in April, 1921. On the morning of, I think, April 6, Mr. Watt informed me that Mr. Holz of the Great Northern Railway had got a valise with a bunch of narcotics, and I went down to the office with Mr. Cole. I saw the grip at that time that this stuff was in. Plaintiff's Exhibit No. 2, is the grip with the exception of the handle. I watched the bottles being counted. There were 8 bottles of morphine and 32 of cocaine, according to labels.

HARRY V. WILLIAMSON, produced as a witness on behalf of the Government, being first duly sworn, testified as follows:

“I am narcotic agent in charge of the Denver division, located at Denver, Colorado, that includes Idaho. About the first day of March, 1922, I received an express package which was set from narcotic inspector or agent, H. W. Cole, to Denver, Colorado, under a franked bill of lading. Plaintiff’s Exhibits 3 and 4 were enclosed in that package. There was also 7 ounces of morphine and 31 ounces of cocaine hydrochloride in addition to those two. The contents of the suit case here in Court are the bottles I refer to. I received them with other narcotic drugs and removed them from the express package and placed them in that suit case and placed the suit case with the contents in the vault in our office at 308 Custom House Building, Denver, Colorado, that is a vault with a combination lock. They remained there until June 30, 1922, at which time I removed them from the vault and turned them over to Narcotic Inspector Harry W. Ballaine to be brought to Coeur d’Alene, for trial, during the time the case was set in July, 1922.

Whereupon, the examination continued as follows:

Q. Did you examine or did you inspect the labels on these bottles at that time?

A. I did.

Q. I will ask you to just inspect the labels and set the bottles out here, so that the jury can see them.

THE COURT: I don't think that is necessary, is it, to take the time to do that?

MR. MORROW: If there is no other objection at this time, we will offer the remaining thirty-eight bottles in evidence.

Q. (By MR. BARDSLEY). Mr. Williamson, who did you say you turned these over to in July?

A. June 30, 1922, I turned them over to Narcotic Inspector Harry W. Ballaine, in our office at 308 Custom House Building, Denver, Colorado.

Q. How long did he have them?

A. He has had them the remainder of the time.

MR. MORROW: He is here and I will call him as a witness.

MR. BARDSLEY: That is all the questions I have.

Whereupon,

HARRY W. BALLAINE, was produced as a witness on behalf of the Government being first duly sworn and testified as follows:

"I am federal narcotic inspector. About March, 1922, or the last part of February, I helped Mr. Cole pack the bottles of narcotics involved in this case, and we expressed them to Denver. On July 30, 1922, at 308 Custom Building, Mr. Williamson

took the suit case out of the vault and I looked at the bottles and accepted it there at the office at that time, and brought them to Coeur d'Alene. They were not out of my possession while in transit. I took them over to the bank across on the corner here, the Exchange Bank, where Mr. Crane, is interested. I put a seal on the suit case, and asked him if he would take care of them in his vault until we came to the next term of Court, that was about July 12, 1922. I next saw this suit case this morning, the seal was unbroken, just the same as I had put it on."

Thereupon,

H. T. HOLZ was recalled and testified as follows:

"We left Troy, Montana, about 7 or 7:30 Spokane time, the evening of April 5, 1921; that would be an hour earlier, Montana time, 6 or 6:30."

Thereupon the Government rested the case, and defendant renewed his motion for directed verdict for the reason that there had been no proof of any sale.

The Court denied the motion and granted defendant an exception.

Thereupon,

MRS. T. B. CAMPBELL, produced as a witness

on behalf of the defendant, being first duly sworn, testified that she had lived in Spokane, Washington, for thirteen years, that she now lived at 307 West Fourth Avenue, and first became acquainted with defendant March 1, 1921, that he was at her house on April 5, 6, 7 and 8, 1921, and that every one of those nights he slept there, and every night during the month of March, the month of April, and two weeks of May; that he had never been out of the house but one night in March. Defendant and a friend of his rented the rooms on the first of March; that she was not related to the defendant by marriage, or otherwise; that defendant came in through the room where she slept as there was no other convenience or entrance to his place of sleeping; and that when she went to bed, and they were out, she would put the key out for him to come in; and he came in there and went to his room through her room; that when he came through her room, he would not turn on the light, and it would be dark when he would come through; that defendant was working on a piece of land at Hayden Lake, early in May, and that on the 6th of April, defendant took her to Hillyard to look for a couple of lots she had there there in the afternoon; they went in his car, and never got out of the car; that she knew this was on the 6th of the month because the 8th of the month was her rent day, and she asked defendant if he would take her rent out to the landlord as the 6th was such a cold, nasty

day; that the rent was payable to Frank Murphy at 1103 Mission Avenue, about 10 or 12 blocks from where she lived.

Whereupon the defendant rested and William DeLong, recalled on rebuttal on behalf of the Government, testified that on the morning of the 6th of April, when he got home, he tried to call the Special Agents Department, and finally got Mr. Pratt in Spokane, and told him what he had seen.

MR. WILLIAM H. PRATT, being recalled in rebuttal on behalf of the Government, testified as follows:

“I looked around the streets for defendant quite a bit, the afternoon of April 6, I had a report from Hillyard from Mr. DeLong, but I did not send anyone to Hillyard to look for the man there or take it up with anyone.

Whereupon,

MR. WESLEY TURNER, produced as a witness in behalf of Government and being first duly sworn, testified as to his experience in criminal investigations and matters of identification, but his testimony was ruled out as not proper rebuttal, and the Government rested.

Whereupon, the case was argued by Mr. Morrow on behalf of the Government and Mr. Bardsley on behalf of the defendant.

Whereupon, the Court instructed the jury as follows:

Instructions of the Court to the Jury:

THE COURT: Gentlemen of the Jury, the indictment in this case is based on what is popularly referred to as the Harrison Anti-narcotic Act. The general purpose of this act is to control the sale and also the purchase of narcotics, such as morphine and cocaine. There are certain provisions in the act regulating the sale and purchase, providing under what conditions purchases may be made, and under what conditions sales may be made of these drugs. Different offenses are defined by the act. One of such offenses so defined is the dispensing or selling or dealing in or distributing the drugs, without having a license so to do. Under certain conditions, druggists, for instance, may obtain a license, and under that license may sell these drugs, but it is made a criminal offense to sell or deal in or dispense the drugs without having registered and procuring such a license. Now it is upon this provision of the Act that this indictment is based. The charge is,—I call your attention to it again—that on or about the 6th day of April, 1921, at Colburn, in Bonner County, Idaho, Dominic Constantine, the defendant, did deal in, dispense, sell, and distribute these two drugs which are named as morphine sulphate and cocaine hydrochloride, and further, that he did so without first having registered

and obtained a license. In the absence of proof the presumption is, and you may assume that he did not have a license to sell. Hence the question is, whether or not he was dealing in or dispensing or selling these drugs. Now there is no evidence, there is no direct evidence, there is no direct proof that he sold or dealt in or disposed of these drugs, and it will be necessary for you to determine from the evidence as it comes before you whether this charge, or this part of the charge is sustained beyond a reasonable doubt.

I hardly need say to you that in a case of this kind, any more than any other criminal charge, it is not necessary to establish the truth of the charge by positive proof or by direct testimony. If the circumstances are such as to produce in the minds of the jurors the requisite conviction beyond a reasonable doubt, then the proofs are sufficient, even though they are indirect or circumstantial, and even though in part the finding or conviction results from fair inferences from the testimony. Hence you may consider the circumstances. Of course, you must first find that the defendant had possession of the drugs. Unless you are convinced beyond a reasonable doubt that he did have possession of these drugs, of course you won't need to go any further. But if you find with the Government, that it was the defendant in the car at that time, and that he did in fact have possession of these many bottles of cocaine and morphine, I say unless

you find that he actually had possession of these drugs, then you need go no further. But if you find that he did have possession of them, then the question is as to whether or not he was dealing in and selling them. Mere possession may be entirely lawful. Mere possession under some circumstances, for the purpose of use, that is, of the use of the possessor, is not in violation of the law. But you will consider the quantity here as a circumstance bearing upon the question as to whether or not the possessor, if he was the defendant, whether or not the possessor had possession merely for his own use, or whether he had possession in the course of his dispensing or distributing or selling it. I may say to you that it is further drawn to your attention that these containers here, these bottles, are without revenue stamps. There is a provision in the statute to the effect that the drug cannot be purchased or sold except in or from the original or stamped package. Now it is not charged here in the indictment that these drugs were in unstamped packages, and hence there is no charge under this particular provision of the law, but you may consider the fact that the bottles appear to be unstamped the containers are unstamped, as further bearing upon the general question as to the legitimacy or illegitimacy of the possession by the defendant, if you find that he did have possession. Hence you may consider that condition, that is, the unstamped condition, and the quantity, and all other circumstances,

both for and against him, and say whether or not he was dealing in and distributing and selling, dispensing these drugs, or whether he simply had possession; for, as I have tried to make clear to you, you can't convict him upon this charge unless you find that, as charged, he was doing something more than violating the law in respect to having possession, and that he was dealing in and dispensing or selling or distributing the drug.

Now the burden was not upon the defendant to establish his innocence of this charge, but it was upon the Government to prove his guilt, and by evidence which convinces you beyond a reasonable doubt. Whether it is direct or inferential, it must be such, as I have already tried to make plain to you, such as will produce conviction in your minds, and a conviction which is without reasonable doubt. So if, after you have fairly considered all of the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the most important affairs of your own lives, then you have no reasonable doubt, and you should convict. If, upon the other hand, you cannot conscientiously say that you have such an abiding conviction, you have a reasonable doubt, and you should acquit.

One more matter, and that is: The defendant has not taken the witness stand. That is a privilege conferred upon him by the law of the land. He can either testify or remain silent, and hence you

would have no right to draw any inference of guilt or indulge in the presumption of his guilt, merely from the fact that he has remained silent. That principle, as you will see, is closely related to the other, which is so familiar to all of you, that a defendant does not have to prove his innocence, but the Government must prove his guilt. Hence he may simply remain silent, and leave it to the Government to prove his guilt, if it can do so. Of course, while you are not to indulge any presumption of his guilt or draw any inference of his guilt from his silence, neither are you to indulge any presumption or draw any inference that he is innocent, from such silence. You will simply not consider the fact at all one way or the other.

There is but one count in the indictment, and so the verdict is very simple, gentlemen, so you will have no difficulty in using it. All of you must agree. Let the bailiff be sworn.

Whereupon, the jury turned to consider the verdict.

Now at this time, the above entitled cause coming on to be heard on the presentation of the Bill of Exceptions herein and the Court being willing that if any errors have been committed, the same be corrected and that speedy justice be done to the defendant herein. The Court does hereby certify that the foregoing Bill of Exceptions correctly and fully states the proceedings and all thereof; and fully and accurately sets forth the testimony in

evidence introduced upon said trial; and contains the instructions of the Court to the jury, and truly states the rulings of the Court upon the questions of law presented; and the exceptions taken by the defendant appearing therein were duly taken and allowed.

Settled and allowed as defendant's Bill of Exceptions this April 26th, 1923.

FRANK S. DIETRICH,

Judge.

Endorsed:

Lodged March 31, 1923,

Filed April 26, 1923.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 1627.

PETITION FOR WRIT OF ERROR.

COMES NOW, Dominic Constantine, defendant herein, and says:

That on the 4th day of December, 1922, the Court entered a judgment herein in favor of the United States of America and against Dominic Constantine, finding said defendant guilty, based upon the verdict of the jury rendered and filed in said action, and upon said judgment of guilty sentenced the said defendant Dominic Constantine to

eighteen months in the Federal Penitentiary at Leavenworth.

WHEREFORE, said Dominic Constantine prays that a Writ of Error may issue in his behalf out of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, for the correction of the errors so complained of and that the bond of \$4000.00 fixed by the Court, operate as a supersedeas and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

W. B. McFARLAND,
Coeur d'Alene, Idaho,
NEIL C. BARDSLEY,
Spokane, Washington,
Attorneys for Defendant,
Dominic Constantine.

Endorsed:

Lodged March 31, 1923,

Filed April 26, 1923,

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 1627.

ASSIGNMENTS OF ERROR.

COMES NOW, the defendant, Dominic Constantine, and makes the following assignments of error, which defendant avers occurred upon the trial of

this cause and which defendant will rely upon in the prosecution of the Writ of Error in the above entitled cause.

1. The Court erred in overruling defendant's demurrer interposed to said indictment in said cause.

2. That the Court erred in denying the defendant's motion for a discharge of the defendant, interposed at the close of the statement of the case on behalf of the government.

3. That the Court erred in overruling the defendant's objection to the testimony of H. T. Holtz, a witness on behalf of the government, in permitting said witness to testify as to the name he saw on a certain bill-fold, the proceedings relative thereto being fully set forth in defendant's bill of exceptions herein.

4. That the Court erred in permitting said witness to testify, over the objections of the defendant, to the contents of a certain bag seized without a warrant, the proceedings thereto being fully set forth in defendant's bill of exceptions herein.

5. That the Court erred in overruling the defendant's motion for a directed verdict at the close of government's case, which proceedings are fully set forth in defendant's bill of exceptions herein.

6. That the Court erred in denying defendant's motion for a discharge of the defendant notwithstanding the verdict.

7. That the Court erred in denying the defendant's motion for a new trial.

WHEREFORE, said defendant Dominic Constantine prays that the judgment of said Court be reversed; that such directions be given, that full force and efficacy may inure to the defendant by reason of the assignments of error above.

W. B. McFARLAND,
Residence and P. O. Address,
Coeur d'Alene, Idaho,
NEIL C. BARDSLEY,
Spokane, Washington,
*Attorneys for Defendant,
Dominic Constantine. ...*

Service acknowledged this 31st day of March,
1923,

E. G. DAVIS,
U. S. Attorney.
McKEEN F. MORROW,
Asst. U. S. Attorney.

Endorsed:

Lodged, March 31, 1923,

Filed April 26, 1923,

W. D. McREYNOLDS,

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 1627.

ORDER ALLOWING WRIT OR ERROR.

On this day came the defendant, Dominic Constantine, and filed herein and presented to the

Court his petition praying for the allowance of a Writ of Error, and filed therewith his Assignment of Error, intended to be urged by him, and prays that the bond given operate as a supersedeas and stay bond, and also that a transcript of the record, proceedings and papers, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof the Court does allow the Writ of Error and the bond heretofore fixed and posted to operate as a supersedeas in the sum of \$4000.00, is approved and the proceedings to enforce such judgment are stayed until such Writ of Error is determined.

Dated in open Court this 26th day of April, 1923.

FRANK S. DIETRICH,
United States District Judge.

Endorsed:

Lodged March 31, 1923,

Filed April 26, 1923,

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

BOND OF DEFENDANT.

Four Thousand (\$4,000.00) dollars in cash deposited in lieu of bond.

(Title of Court and Cause.)

No. 1627.

AMENDED PRAECIPE FOR TRANSCRIPT OF
RECORD.

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

You will please include in the record of the above entitled cause to be docketed in the Circuit Court of Appeals for the Ninth Judicial Circuit, and cause to be printed as the record in said Court of Appeals, and send to the Clerk of said Court of Appeals, the following records in the above entitled cause, to-wit:

Indictment, Plea of Defendant, Verdict of the Jury, Judgment and Sentence, Bill of Exceptions, together with the Order of the Judge settling the same, Writ of Error and Citation, Petition for Writ of Error, Order Allowing Writ of Error, Assignments of Error, Bond on Writ of Error, your Certificate to the Transcript, and this Praecipe, and oblige the defendant, Dominic Constantine, and

W. B. McFARLAND,

Residence and P. O. Address:
Coeur d'Alene, Idaho,

NEIL C. BARDSLEY,

Residence and P. O. Address:
Spokane, Washington,

*Attorneys for Defendant,
Dominic Constantine.*

Service acknowledged and copy received this 30th
day of April, 1923.

No request is made for any additional papers and printing may begin at once.

E. G. DAVIS,

U. S. Attorney,

McKEEN F. MORROW,

Asst. U. S. Attorney.

Endorsed:

Filed April 30, 1923,

W. D. McREYNOLDS, Clerk.

WRIT OF ERROR.

The United States of America.—ss.

To the Judge of the District Court of the United States for the District of Idaho, Northern Division:

Because in the record and proceeds, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Frank S. Dietrich, one of you, between United States of America, plaintiff and defendant in error, and Dominic Constantine, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 26th day of April, 1923.

(SEAL)

W. D. McREYNOLDS,

Clerk.

Endorsed:

Lodged March 31, 1923,

Filed April 26, 1923,

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 1627.

CITATION.

The President of the United States to the above named plaintiff and to E. G. Davis, attorney for plaintiff:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the District of Idaho, wherein Dominic Constantine, is the plaintiff in error, and you are attorney for the defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done the parties in that behalf.

WITNESS the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 26th day of April, A. D. 1923, and of the independence of the United States, one hundred and forty-six.

FRANK S. DIETRICH,
Judge of the Above Entitled Court.

Attest:

W. D. McREYNOLDS, *Clerk.*

(SEAL)

Service of the within Citation is hereby acknowledged this 26th day of April, 1923.

E. G. DAVIS,
McKEEN F. MORROW,

Attorneys for Plaintiff.

Endorsed:

Filed April 26, 1923,

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 1627.

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 56, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$68.75, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court, this 7th day of May, 1923.

W. D. McREYNOLDS,

(SEAL)

Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DOMINIC CONSTANTINE
MONTAGUE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

*On Writ of Error to the United States District
Court for the District of Idaho,
Northern Division.*

ATTORNEYS FOR PLAINTIFF IN ERROR.

W. B. McFARLAND,
Coeur d'Alene, Idaho.

NEIL C. BARDSLEY,
608 Hyde Building,
Spokane, Washington.

FILED
AUG 14 1923

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DOMINIC CONSTANTINE

MONTAGUE,

Plaintiff in Error,

vs.

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Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

*On Writ of Error to the United States District
Court for the District of Idaho,
Northern Division.*

ATTORNEYS FOR PLAINTIFF IN ERROR.

W. B. McFARLAND,
Coeur d'Alene, Idaho.

NEIL C. BARDSLEY,
608 Hyde Building,
Spokane, Washington.

STATEMENT OF THE CASE.

The defendant was indicted by the Grand Jury sitting at Coeur d'Alene, State of Idaho, on the 24th day of May, 1921, under the charge of unlawfully dispensing narcotics, in violation of Act of December 17, 1914; the charging part which is as follows:

“On or about the 6th day of April, A. D. 1921, at Colburn, in Bonner County, Idaho, and in the Northern Division of the District of Idaho, Dominic Constantine did then and there deal in, dispense, sell and distribute certain compounds and derivatives of opium and coca leaves, to-wit, morphine sulphate and cocaine hydrochloride, without first having registered with the Collector of Internal Revenue for the District of Idaho his name and place of business and place or places where such business was to be carried on, as required by law.

“Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.”

That thereafter and during the month of July, 1922, the defendant was arrested and taken before the District Court of the United States for the District of Idaho.

(R. pp. 7-8.)

The case was regularly set for trial, came on for hearing before the Hon. Frank S. Dietrich, Judge of the United States District Court, at Coeur d'Alene,

Idaho, November 27th, 1922, at which time a demurrer was interposed to the indictment and overruled, after which the defendant entered his plea of Not Guilty of the charge. (R. p. 9.)

A jury was regularly impaneled, the Assistant United States District Attorney in opening statement to the jury stated what the Government intended to prove, viz. That a Great Northern Freight Train was stopped at Colburn, Idaho, on the other side of Sand Point, and Special Agent Harry Holtz, in checking the cars noticed a car door that wasn't sealed; that he noticed persons in the car, one of whom handed him a card which was the card of Dominic Constantine; that this train was going from Troy, Montana, to Hillyard, Washington; that the special agent directed the men to bring a pack sack which was in the car, in which pack sack was found a large quantity of morphine and cocaine, morphine sulphate and cocaine hydrochloride.

(R. pp. 13-14.)

At the close of such statement, attorney for the defendant moved the court for an order discharging the defendant, for the reason that the statement plainly indicates insufficient proof as to the crime alleged in the information.

(R. p. 15.)

During the course of the trial Mr. H. T. Holtz, over the objections of the counsel, was permitted to

testify as to the contents of a certain bill fold, as follows:

A. I asked them where they were going, and this man spoke up and said he was going to Spokane. I says, "Here's a good place to get out and start walking." He walked over toward the door. I had a flashlight on him, and he walked over toward the door and pulled out his bill fold and says, "I am a brakeman," and he handed me the bill fold.

MR. BARDSLEY: Have you that bill fold now?

A. No, I haven't.

MR. BARDSLEY: I object to any testimony as to what was upon that and what it contained.

THE COURT: Well, were you going to seek testimony as to its contents?

MR. MORROW: If the counsel desires it for the record, I will ask the question—

THE COURT: Did you see the bill fold?

A. Yes, sir; I had it in my hand.

THE COURT: Did you take it?

A. He handed it to me.

THE COURT: What did you do with it?

A. Read the name on it and handed it back to him.

THE COURT: And that is the last you have seen of it?

A. Yes, sir.

THE COURT: The objection is overruled.

MR. BARDSLEY: If the Court please, my reason for objecting to this would be compelling the introduction of evidence against this defendant which we have no way of contradicting. This man might have been mistaken in reading that. We are entitled to the best evidence.

THE COURT: The general rule is that where a writing is presumably or prima facie in the possession of the defendant, the Government cannot call for it, because that would be the compelling of your evidence itself. Therefore secondary evidence may be resorted to. You may proceed.

MR. MORROW: Q. What was the contents of this bill fold that you read?

A. It contained a brakeman's card. On the card was "Dominic Constantine, Kalispell Division, Great Northern Railway, brakeman."

Q. How was the word "Constantine" spelled on that?

A. I couldn't say just how it was spelled now. I have seen it spelled two or three different ways since and before that time.

(R. pp. 17-18.)

Same witness was interrogated concerning the contents of a certain pack sack over the objections of counsel, as follows:

A. I went back and took the pack sack and took it up on the engine and unlocked it and examined the contents.

MR. BARDLSEY: I object to that testimony. Did you have a search warrant?

A. No, sir.

MR. BARDSLEY: I object to the testimony of this witness as to any contents of this. It is contrary to constitutional provisions prohibiting search and seizure without a warrant.

THE COURT: Overruled.

MR. BARDSLEY: Is it necessary for me to take exceptions? I don't know whether it is or not. May I have exceptions to the rulings?

THE COURT: It will be understood that you have exceptions to all adverse rulings.

MR. MORROW: Handing you an article, I will ask you to state what it is.

A. A pack sack.

Q. Is there any way in which you can identify it with the pack sack to which you have just referred?

A. I put my mark on there in green ink.

Q. What is that mark?

A. My initial.

Q. "H"?

A. "H".

MR. MORROW: We will ask to have this marked as Government's Exhibit 1.

"There was a quantity of morphine and cocaine in the pack sack—the bottles were marked that. There was a grip in the pack sack."

And thereupon a certain grip was shown the witness who then testified as follows:

"That is the grip that was in the pack sack."

"This handle wasn't on here at that time. You couldn't carry it with that thing. I had a strap on here, a kind of rawhide wore out, and it broke as I was carrying it, because it was too heavy. The bottles I refer to were inside the grip."

(R. pp. 20-21.)

ON CROSS-EXAMINATION testified as follows:

Q. Now, as I understand your testimony, you found a car which was unlocked?

A. Yes, sir.

Q. And went to the door and looked in?

A. Yes, sir.

Q. And in that car was a man and a boy?

A. Yes, sir.

Q. And you told them to come out?

A. Yes, sir.

Q. And they started to come out?

A. Yes.

Q. And as they were coming out you noticed a pack sack back in the car?

A. Well, he came out with a pack sack, when he came out.

Q. Did he come out with a pack sack?

A. Yes, because I sent him back after it.

Q. When he came out, the man got up and came out?

A. He came to the door.

Q. And then you saw a pack sack back there?

A. Yes.

Q. And then you sent him back after the pack sack?

A. Yes, sir.

Q. Then he brought it out?

A. Yes, sir.

Q. At the time you sent him back for the pack sack did this man say anything to you?

A. Yes.

Q. What did he say?

MR. MORROW: That is objected to as hearsay.

THE COURT: Overruled.

A. He said, "I'm a brakeman."

Q. Did he say anything about the pack sack?

A. He said he didn't own it, didn't have any pack sack.

Q. You testified to that before Judge Rudkin?

A. I believe I did.

Q. And when you opened the door who was near this pack sack,—the boy or the man?

A. They were both up at one end of the car, and the pack sack was up in that end of the car.

Q. The boy was laying on the pack sack, was he not?

A. I couldn't say as to that.

Q. You don't remember that?

A. No, sir.

Q. Do you remember testifying to that fact before Judge Rudkin?

A. I don't remember of it. He may have been sitting on the pack sack. There was only about three feet between the side walls of the car and the pack sack on one side. It would be pretty close to the—

Q. This was a dark night?

A. Dark night—One or one-thirty in the morning.

Q. And how long were you there at that door?

A. Oh, just—I wouldn't say over a minute or a minute and a half or two minutes.

Q. A very short time?

A. A very short time, yes.

(R. pp. 23-24-25)

Witnesses Ed Thompson and M. L. Stickney were produced on behalf of the Government and testified that the train upon which the defendant was alleged to have been, arrived at Troy, Montana, on the evening of April 5th, 1921; that after its arrival they saw a man answering Constantines' description, carrying a black grip; that the testimony of all witnesses for the Government was to the effect that the train from which the defendant was taken by the officers, was going from Troy, Montana, to Spokane, Washington; that the defendant was ordered out of the train at Colburn, Idaho.

Other witnesses were called on behalf of the Government and testified that they were connected with the Great Northern Railway, one of whom had seen the defendant at Hillyard the next morning and the other had seen the same suit case on a previous occasion.

Fred A. Watt, Harold W. Cole, Albert A. Gatons, L. R. Watts, Harry V. Williamson and Harry W. Balaine, were called as witnesses on behalf of the Government and related a rather interesting trans-

action relative to the handling of the exhibits, after which the Government closed its case without any testimony as to whether or not the defendant had registered with the Collector of Internal Revenue his name and place of business, and place or places where such business was to be carried on; without showing or proving that Colburn, Idaho, is within the Northern Division, District of Idaho; without placing the exhibits, which had been identified, in evidence.

ASSIGNMENT OF ERRORS.

1. The Court erred in overruling defendant's demurrer interposed to said indictment in said cause. (R. pp. 12-13.)

2. That the Court erred in denying the defendant's motion for a discharge of the defendant, interposed at the close of the statement of the case on behalf of the Government. (R. p. 15.)

3. That the Court erred in overruling the defendant's objection to the testimony of H. T. Holtz, a witness on behalf of the Government in permitting said witness to testify as to the name he saw on a certain bill-fold, the proceedings relative thereto being fully set forth in defendant's bill of exceptions herein. (R. pp. 17-18.)

4. That the Court erred in permitting said witness to testify, over the objections of the defendant, to the contents of a certain bag seized without a

warrant, the proceedings thereto being fully set forth in defendant's bill of exceptions herein. (R. p. 20.)

5. That the Court erred in overruling the defendant's motion for a directed verdict at the close of the Government's case, which proceedings are fully set forth in defendant's bill of exceptions herein. (R. p. 39.)

6. That the Court erred in denying defendant's motion for a discharge of the defendant notwithstanding the verdict.

7. That the Court erred in denying the defendant's motion for a new trial.

8. That the Court erred in passing judgment. (R. p. 10.)

9. The evidence introduced by the Government is insufficient to support the verdict or judgment in that it fails to show that defendant committed the crime charged in the indictment and the testimony of the witnesses for the Government show that they observed defendant from Troy, Montana, where he boarded the train until his arrival at Colburn, Idaho, where he was taken from the train, and that he made no sale during that time, of narcotics.

ARGUMENT AND AUTHORITIES.

The defendant is accused of violating the so-called Harrison Act of December 17, 1914.

Section 1 is as follows:

On and after the first day of March, nineteen hundred and fifteen, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on: Provided, That the office, or if none, then the residence of any person shall be considered for the purposes of this Act to be his place of business. At the time of such registry and on or before the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said collector a special tax at the rate of \$1 per annum: Provided, That no employee of any person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs, acting within the scope of his employment, shall be required to register or to pay the special tax provided by this section: Provided further, That the person who employs him shall have registered and paid the special tax as required by this section: Provided further, That officers of the United States Government who are lawfully engaged in making purchases of the above-named drugs for the various departments of the Army and Navy, the Public Health Service, and for Government hospitals and prisons, and officers of any State government, or of any county or municipality therein, who are lawfully engaged in making purchases of the above-named drugs for State, county or municipal hospitals or prisons,

and officials of any Territory or insular possession or the District of Columbia or of the United States who are lawfully engaged in making purchases of the above-named drugs for hospitals or prisons therein shall not be required to register and pay the special tax as herein required.

It shall be unlawful for any person required to register under the terms of this Act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section.

Section 2, (a) is as follows:

To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: Provided, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

ASSIGNMENT NO. 1.

The information alleges that:

“On or about the 6th day of April, A. D. 1921, at Colburn, in Bonner County, Idaho, and in the Northern Division of the District of Idaho, Dominic

Constantine did then and there deal in, dispense, sell and distribute certain compounds and derivatives of opium and coca leaves, to-wit: morphine sulphate and cocaine hydrochloride, without first having registered with the Collector of Internal Revenue for the District of Idaho his name and place of business and place or places where such business was to be carried on, as required by law.”

To this information a demurrer was interposed, which was overruled by the Court. The question presented being that the information does not allege that the defendant is not of the class exempted by the statute.

This question has been passed upon in the case of *United States v. Woods*, 224 Fed., page 278, the Court uses the following language:

“Whenever an offense can be committed by only certain classes of persons, the indictment must expressly allege that accused is of those classes or it is fatally defective in substance.”

and as the indictment in this case made no distinction, in our mind it is defective, and the failure to do so, fatal, notwithstanding the last paragraph and provision of Section 8 of said Act.

ASSIGNMENT NO. 2.

The Assistant United States Attorney, in making a statement to the jury, before the introduction of testimony, clearly indicated that the testimony did not prove a sale, as charged in the information, in

view of the fact that he made it clear that the defendant was seen near the train at Troy, Montana; that the train was stopped at Colburn, Idaho, and the defendant taken from the train. Our contention being that a sale could not be presumed under such circumstances, as the defendant can not be compelled to enter a State and thereby have jurisdiction conferred upon the Courts of that State, and burdened with a presumption.

ASSIGNMENT NO. 3.

H. T. Holtz was permitted to testify as to the contents of a certain bill-fold, over the objection of the defendant, and our contention is that where a party asserts for the first time at the trial, the contents of a purported instrument, such testimony is not admissable, and they should not be allowed to prove its contents by secondary evidence.

In the case of *Clary v. O'Shea*, 72 Minn. 105, 75 N. W. 115, 71 A. S. R. 465; that Court says:

“To allow the one party to assert for the first time on the trial that a certain written instrument existed and was in the possession of the opposite party, and, because the latter denied that it ever existed, allow the former to prove the contents of the alleged instrument, without having given any notice to produce it, would open the door for perjury and surprise.”

See also *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746.

ASSIGNMENT NO. 4.

The Court permitted H. T. Holtz, witness for the Government, to testify relative to the contents of a certain pack sack, over the objection of counsel for defendant, which was as follows:

Q. Then what did you do?

A. I went back and took the pack sack and took it up on the engine and unlocked it and examined the contents.

MR. BARDSLEY: I object to that testimony. Did you have a search warrant?

A. No, sir.

MR. BARDSLEY: Was there a Government officer there with you?

A. No, sir.

MR. BARDSLEY: I object to the testimony of this witness as to any contents of this. It is contrary to constitutional provisions prohibiting search and seizure without a warrant.

THE COURT: Overruled.

MR. BARDSLEY: Is it necessary for me to take exceptions? I don't know whether it is or not. May I have exceptions to the rulings?

THE COURT: It will be understood that you have exceptions to all adverse rulings.

(R. p. 6.)

Article IV. of the Constitution of the United States, reads as follows:

UNREASONABLE SEARCHES PROHIBITED.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the case of *Purkey v. Mabey*, 193 Pac. 79, the Supreme Court of Idaho uses the following language:

“Article 1, Sec. 17, of the Constitution provides:

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.”

“The right protected by the above provision of our Constitution has been deemed of so great importance that a similar provision is found in the Constitution of the United States and in the Constitution of nearly every State in the Union. Under such constitutional provisions, it is uniformly held that the search warrant must conform strictly to the constitutional and statutory provisions providing for its issuance. It must contain a description of the premises to be searched. No discretion must be left to the officer executing the warrant as to the premises which he is authorized to search.”

See also, *Youman v. Commonwealth of Kentucky*, 13A. L. R., 1303; *State v. Marxhausen*, 3 A. L. R., 1505; *Dukes v. United States*, 275 Fed. 142; *Holmes v. United States*, 275 Fed. 49; *Berry v. United States*, 275 Fed. 680; *United States v. Lydecker*, 275 Fed. 976; *United States v. Kelly*, 277 Fed. Reporter, 485; *Ganci v. United States*, Fed. Reporter, Vol. 287. 60.

In the case of *Kanellos v. United States*, 282 Fed. Reporter, page 467, the Court says:

“To give countenance to what was done here as a reason for denying to an accused the benefit of the protection of the constitutional amendments involved would, as stated by Mr. Justice Holmes (*Silverthorne v. United States*, 251 U. S. 385, 392, 40 Sup. Ct. 182, 183, 64 L. Ed. 319), be to reduce ‘the Fourth Amendment to a form of words,’ and as stated by Mr. Justice Day (*Weeks v. United States*, 232 U. S. 393, 34 Sup. Ct. 344, 58 L. Ed. 652, L. R. A. 1915 B 834, Ann. Cas. 1915 C, 1177):

“The protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”

The Supreme Court of the United States has frequently had to define the rights of an accused under the Fourth and Fifth Amendments, and has, with unvarying consistency, strongly upheld the amendments as necessary to the citizen’s personal liberty. In one of the very recent cases, *Gouled v. United States*, 255 U. S. 298, 312, 313, 41 Sup. Ct. 261, 65 L. Ed., 647, Mr. Justice Clarke, speaking for the court said:

“It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U. S. 616, in *Weeks v. United States* 232 U. S. 383, and in *Silverthorne Lumber Co. v. United State* 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is that such rights are declared to be indispensable to the full enjoyment of personal security, personal liberty and private property; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law, it has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent a stealthy encroachment upon or gradual depreciatioin 'of the rights secured by them, by imperceptible practice of courts or by well intended, but mistakenly overzealous, executive officers.' 255 U. S. at pages 303, 304, 41 Sup. Ct. at page 263 (65 L. Ed. 647).”

ASSIGNMENTS NOS. 5, 6, 7, 8, AND 9.

We will argue the foregoing assignments as one, as they have to do with the insufficiency of the evidence to support the verdict.

THE EVIDENCE INTRODUCED ON THE PART OF THE GOVERNMENT, WAS INSUFFICIENT TO SUBMIT TO THE JURY THE QUESTIONS OF WHETHER

OR NOT DEFENDANT WAS GUILTY OF THE CRIME CHARGED, AND MOREOVER, AFFIRMATIVELY SHOWED THAT THE DEFENDANT WAS NOT GUILTY.

Section 8 of the Act upon which the indictment in this case is based, provides that possession or control of narcotics, shall be presumptive evidence of a sale. Had the Government proved that the defendant was taken out of a box car with a large quantity of narcotics in his possession, there might have been sufficient evidence to raise a presumption that he was selling the same, had the Government not by its own witness showed that such sale on the part of the defendant within the jurisdiction of this court, was utterly impossible.

“A presumption of law is a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong inference of fact is prima facie correct, and will therefore sustain the burden of evidence, until conflicting facts on the point are shown. Where such evidence is introduced, the presumption at law is *functus officio* and drops out of sight.”

22 Corpus Juris, page 124, paragraph 61, with cases and foot notes 51 and 52.

It is our contention that the undisputed testimony of each and every one of the witnesses for the Government, showed conclusively that a sale could not

have been made within the jurisdiction of the court, and thus under the rule of law above cited, entirely overcame any presumption arising from the alleged possession by defendant of narcotics at the time in question.

H. T. Holtz was the first witness produced by the Government. He testified that on the occasion in question, he was a special agent of the Great Northern Railway Company in the district between Spokane and Troy, Montana, and was with a freight train on the night of the 5th of April and the morning of the 6th of April, 1921, which train was at that time headed into a sidetrack at Colburn, Idaho, in order to allow a passenger train to pass. Holtz further stated that this train stopped at Colburn shortly after midnight on the morning of April 6th, and that walking to a freight car that was closed, he opened the door and saw the defendant. (R. pp. 16 and 17.)

The second witness called by the Government was Ed Thompson, also a special agent for the Great Northern, who came to Troy, Montana, the evening of the 5th of April, 1921, in charge of the freight train. He got into Troy at 5:30 P. M. Montana time. At that time he saw the defendant, or at least a man answering his description, with a black grip. (R. pp. 26 and 27.)

The third witness called by the Government was M. L. Stickney, who was in the employ of the Great

Northern Railroad at the time in question, and he also testified that the train came into Troy, Montana, in the evening of April 5, 1921. He saw Dominic Constantine, or a man answering his description, with a black grip at that time.

The fourth witness, William De Long, who was at that time employed by the railroad company as yard clerk, saw Dominic Constantine at Hillyard, Washington, on the morning of April 6th, 1921, at about 7:30 A. M., and saw the train in question. (R. pp. 28 and 29.)

The fifth witness called by the Government was William H. Pratt, who at the time in question, was the special agent of the Great Northern Railroad Company and stationed at Spokane. He testified merely to an acquaintanceship with Constantine, and recognized the black grip which he had seen on previous occasions. (R. pp. 29 and 30.)

The sixth witness was Fred A. Watt, a witness in behalf of the Government, who testified to nothing else except the custody of the grip and narcotics alleged to have been taken from Constantine at the time of his capture. (R. pp. 30-32.)

The seventh witness of the Government was Harold W. Cole, a federal narcotic agent, who testified to nothing further than quantity and nature and custody of the goods taken away from Constantine and their value. (R. pp. 32-35.)

The eighth witness was Albert E. Gatons, also a

federal narcotic agent, who testified as to the custody of the bottles taken from Constantine. (R. pp. 35-36.)

The ninth witness, Mr. L. R. Watts, another federal narcotic agent, also testified concerning the custody of the narcotics after their alleged taking from the defendant, and the testimony of Harry V. Williamson, another government narcotic agent, was to the same effect. (R. pp. 36-38.)

Harry W. Ballaine, the next witness produced by the Government and also a federal narcotic inspector, testified to nothing further than to identify the exhibits in the case. (R. pp. 38-39.)

Thus the Court must see that the Government proved conclusively by their own witnesses and undisputed by any other witnesses, that on the evening of April 5, 1921, at Troy, Montana, and without the jurisdiction of this court, the defendant boarded the train and stayed with the same until it arrived at Colburn, and did not leave the freight car in which he was riding until taken therefrom by the officers. This shows conclusively that a sale was not made by the defendant subsequent to boarding the train at Troy, Montana, and that if made at all, it was made in the jurisdiction other than the District of Idaho. That the sale was not made at Colburn, Idaho, is also conclusively established, as the witnesses for the Government testified that they themselves, after the train stopped, opened the

door of the freight car, found Constantine there and took away the narcotics alleged to have been in his possession.

At the close of the State's case, the defendant moved for a discharge of the defendant, which motion was denied.

In *State v. Sullivan*, 17 A. L. R. 905, that court holds:

“Proof of the charge in criminal causes involves the proof of two distinct propositions—first, that the act itself was done, and secondly, that it was done by the persons charged, and and no others.”

Also in the same case, on the same page the Court states:

“The general rule as to the burden of proof in criminal cases required the state to prove beyond a reasonable doubt the offense charged in the information; and, if the proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal. 8 R. C. L. Sec. 163, p. 170; *State v. Young*, 52 Or. 227, 18 L. R. A. (NS) 688, 132 Am. St. Rep. 689, 96 Pac. 1067; *Hollywood v. State*, 19 Wyo. 493, 120 Pac. 47v, 122 Pac. 588, Ann. Cas. 1913 E, 218.”

We contend that the State failed to prove the allegations as contained in the indictment, in that they failed to prove a sale and failed to prove that the defendant did not register with the Collector of Internal Revenue for the District of Idaho.

The Supreme Court in the case of Samuel M. Clyatt v. United States, 49 Law Ed., 726, on page 732, uses the following language:

“No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.”

In *State v. Marcoe*, 193 Fed. Rep., 80, the Supreme Court of Idaho, uses the following language:

“In order to sustain a conviction based solely on circumstantial evidence—

“the circumstances must be consistent with the guilt of the defendant and inconsistent with his innocence, and incapable of explanation on any other reasonable hypothesis than that of guilt.”
Broshears v. State (Okl. Cr. App.) 187 Pac. 254.

If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the theory of innocence be adopted. *Vernon v. U. S.*, 146 Fed. 121, 76 C. C. A. 547; *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59; *State v. Vandewater* (Iowa) 176 N. W. 883; *Robinson v. State*, 188 Ind. 467, 124 N. E. 489; *Tolbert v. State* (Tex. Cr. App.) 217 S. W. 153; *Wales v. State* (Tex. Cr. App.) 217 S. W. 384.”

In *Brenner v. United States*, 287 Fed. 636, on page 639, the Court states:

“It is a general rule in reference to an indictment that all material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital.”

In the case of *State v. Frey* (Kansas) Pac. Rep. Vol. 208, No. 2 Adv. Sheets, 547, the Court states:

“Courts expression of serious doubt as to conviction before verdict immaterial; duty of court to set verdict aside when in doubt as to sufficiency of evidence to support it.”

In which case they cite the case of *Butler v. Milner*, 166 Pac. 478, as follows:

“The sole function of the jury is to return a verdict, but the matter does not rest there; before a judgment can be rightly entered upon a verdict the judge of the court must exercise a judicial function and approve or disapprove the verdict. It cannot be doubted that frequently miscarriage of justice would be avoided by a more vigorous exercise of the trial courts discretion in granting new trials, and it is doubtful if a weightier responsibility rests upon the Judge of the District Court than the proper exercise of this part of his judicial functions.”

While we are unalterably opposed to the traffic in narcotics, and by reason of the views we have against the offenders thereof, we feel that it is our

duty and the duty of those having the enforcement of these laws, to see that a person charged with this grave offense is given a fair and impartial trial, and not convicted upon suspicion; and we do contend that the defendant has not been afforded the privileges granted to him by the Constitution; and that the benefit of a reasonable doubt, provided by law, has not been extended to the defendant; and there is such a grave doubt in our minds, after hearing the testimony of the witnesses for the Government, to insist before this Court that the Government be required to produce such evidence as will leave no doubt as to the guilt of defendant on the charge as contained in the information. We respectfully submit that the defendant is entitled to a discharge for lack of evidence as to the alleged crime.

Respectfully submitted,

W. B. McFARLAND

and

NEIL C. BARDSLEY,

Attorneys of Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

DOMINIC CONSTANTINE MONTAGUE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

*On Writ of Error to the United States District Court
for the District of Idaho, Northern Division.*

E. G. DAVIS,
United States Attorney,

JOHN H. McEVERS,
Ass't United States Attorney,
Residence, Boise, Idaho,
Attorneys for Defendant in Error.

W. B. McFARLAND,
Coeur d'Alene, Idaho,

NEIL C. BARDSLEY,
Hyde Bldg., Spokane, Washington,
Attorneys for Plaintiff in Error.

No.....

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JOHN H. McEVERS,
Ass't United States Attorney,
Residence, Boise, Idaho,
Attorneys for Defendant in Error.

W. B. McFARLAND,
Coeur d'Alene, Idaho,

NEIL C. BARDSLEY,
Hyde Bldg., Spokane, Washington,
Attorneys for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

DOMINIC CONSTANTINE MONTAGUE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

*On Writ of Error to the United States District Court
for the District of Idaho, Northern Division.*

STATEMENT OF THE CASE.

The defendant was indicted May 24, 1921, for dealing in, dispensing, selling and distributing morphine sulphate and cocaine hydrochloride. (Tr. pp. 7 and 8). He was convicted November 27, 1923, (Tr. p. 10), and sentenced to imprisonment in the United States Penitentiary at Leavenworth, Kansas, for eighteen months. (Tr. p. 11). A writ of error from this judgment was allowed which assigned error in overruling defendant's demurrer to

the indictment, certain rulings as to evidence, the action of the Court in denying defendant's motion for a directed verdict, and the action of the Court in denying motions in arrest of judgment and for a new trial.

The indictment is set out in full in the transcript and the charging part thereof in the brief of plaintiff in error.

The defendant was indicted under the name of Dominic Constantine. When the cause was called for trial, he announced that his true name was Dominic Constantine Montague and it was ordered that further proceedings be had under the latter name. (Tr. p. 10).

The testimony offered on behalf of the Government showed that on the early morning of April 6, 1921, witness H. T. Holtz, a special agent of the Great Northern Railway Company, was traveling with a freight train coming from Troy, Montana, to Spokane. While the train was on a sidetrack at Colburn, Idaho, witness Holtz walked up along the train and found a car door without a seal and opened it. (Tr. p. 16). This occurred between one and one-thirty A. M., April 6th. He saw a man and a boy. The man stated he was a brakeman and handed witness a bill fold which witness examined and returned to the man. (Tr. pp. 17 and 18). Over defendant's objection, the Court permitted

witness to testify that this bill fold contained a brakeman's card with the words, "Dominic Constantine, Kalispel Division, Great Northern Railway, brakeman." (Tr. p. 18). Witness told the man to get that pack sack and get out and when the man brought the pack sack and set it down in front of witness in the car door, he turned and jumped out of the car on the other side. Witness stated positively that at this time he recognized the man as Dominic Constantine, a Great Northern brakeman; that he had seen him at the hearing in the Federal Court at Spokane and that he was the defendant in this action. (Tr. p. 19). Witness fired as defendant jumped from the car but defendant escaped in the brush. Witness identified the pack sack which he marked at the time and it was introduced in evidence. The pack sack contained a grip which was also identified and introduced in evidence and the grip contained a large quantity of morphine and cocaine. Witness took the pack sack, the grip and its contents up on the engine where it was opened and examined. He kept the bag and its contents in his custody until he reached Spokane and delivered them to Mr. Fred Watt of the United States Department of Justice. Witness initialed the bottles marked plaintiff's Exhibits Nos. "3" and "4". (Tr. p. 22). Witness positively identified both the pack sack and the grip which were introduced in evidence over objection of counsel for the defense. (Tr. pp. 20-22).

The witness Ed. Thompson and M. L. Stickney testified that they turned the freight train over to Special Agents Holtz and Weigner at Troy, Montana, on the evening of April 5th, 1921, and that at about five-thirty P. M. that evening they saw a man, answering the description of defendant, walking up the track towards town from the train carrying a black grip and witness Stickney saw him jump out of a car on the freight train. (Tr. pp. 26 and 27). Witness De Long testified that on the morning of April 6, 1921, about seven-fifteen or seven-thirty, he saw the defendant going south on Harrison Street in Hillyard, Washington, six or seven blocks from the yard office. Witness went off shift at seven o'clock. In the morning before he went home, he had been told that the special agents had found this defendant with some dope. Witness had known defendant and worked with him at Whitefish, Montana. (Tr. pp. 28 and 29).

Witness Pratt, also a special agent of the Railway Company, identified the grip, plaintiff's Exhibit "2", as a grip which he had seen in the possession of this defendant about a month previous to April 6th. (Tr. pp. 29 and 30).

Fred W. Watt, a special agent of the Department of Justice, who was stationed at Spokane in 1921, testified that Mr. Holtz delivered to him a grip containing narcotics on April 6, 1921. Plaintiff's Exhibit No. "2", witness said, looked like the grip with

a new handle on it. There were forty bottles in the grip, thirty-two of which were marked "morphine" and eight marked "cocaine". They bore printed labels. The grip and its contents were placed in the iron cage in the special agent's office. Mr. Harold W. Cole and Mr. Lou Watts, Federal narcotic agents, came into the office that day, counted the bottles and later Mr. Cole came back and got four bottles. (Tr. pp. 30-32).

Mr. Harold W. Cole, a Federal narcotic agent with five years' experience and who qualified as a graduate pharmacist and a person capable of testing cocaine and morphine, testified that he initialed several of the bottles on April 6, 1921, when he counted them; that later he secured two or four of the bottles, brought them to Coeur d'Alene to appear before the grand jury and tested them and found that they were morphine sulphate and cocaine hydrochloride and that there were approximately thirty-two ounces of the latter and eight ounces of the morphine sulphate. None of the bottles bore revenue stamps. Exhibits "3" and "4" were identified as the bottles witness tested, and were introduced in evidence. (Tr. pp. 32 and 33). Witness further testified that in legitimate sales, the value was about \$12.00 an ounce for the morphine and \$10.00 an ounce for the cocaine; that the current price in illegitimate sales at that time in the Northern Idaho locality was \$60.00 an ounce for morphine

and \$50.00 an ounce for cocaine. This is the amount the retailer would pay the wholesaler or smuggler. On sales by the retailer to the customer, an enormous profit is made.

Witnesses Gatons, L. R. Watts, Harry V. Williamson and Harry W. Ballaine, Federal narcotic agents, testified as to the custody of the forty bottles of cocaine and morphine between the date of their original seizure and their production in Court. (Tr. pp. 35-39), and the other thirty-eight bottles were introduced in evidence. (Tr. p. 38).

At the close of the Government's case, defendant renewed his motion for a directed verdict "for the reason that there had been no proof of any sale". (Tr. p. 39). The Court denied the motion and thereupon defendant produced as a witness in his behalf Mrs. T. B. Campbell, a resident of Spokane, Washington, who testified that the defendant rented a room from her about March 1, 1921, and that he was at her house on April 5th, 6th, 7th and 8th, 1921, and slept there every one of those nights and every night during March, April and the first two weeks of May. She testified that defendant and another man rented the rooms and that defendant had to come through the room where she slept in order to get to his bed room; that he would not turn on the light when he came through and he usually came in in the night time. She also testified that on the 6th day of

April, 1921, defendant took her to Hillyard, Washington, during the day, to look at a couple of lots but that they never got out of the car and could not find the lots.

The motion for a directed verdict was not renewed at the close of the evidence and no exceptions were taken to the instructions of the Court.

No reference whatever to any motion in arrest of judgment or for a new trial appears either in the bill of exceptions or at any point in the record other than in the assignment of error.

BRIEF OF THE ARGUMENT.

It was not necessary to allege in the indictment that the defendant was a person required to register before selling, dealing in, dispensing, etc., narcotic drugs. This was clearly implied from the allegation that he sold, dealt in, dispensed, and distributed without having registered.

Section 1, Act of December 17, 1914, as amended, 6287G, U. S. Compiled Statutes, Supp. 19;

Section 8, Act of December 17, 1914, 38 Stat. 789;

Pierriero vs. United States, 271 Fed. 912;

Bacigalupi vs. United States, 279 Fed. 111.

Secondary evidence of a writing satisfactorily shown to be in possession of defendant may be admitted. No notice to produce need be given.

McKnight vs. United States, 115 Fed. 972;

McKnight vs. United States, 122 Fed. 929;
Federal Case No. 14,977;

United States vs. Reyburn, 6 Pet. 366,
368.

The Fourth Amendment to the Constitution, pertaining to unlawful searches and seizures, relates to government action only. It does not prohibit the use in evidence by the United States of matters or things obtained or secured by private parties without search warrants.

Herrine vs. United States, 276 Fed. 806;

Burdeau vs. United States, 256 U. S. 465.

A motion for a directed verdict is not reviewable unless made or renewed at the close of the evidence.

Clark vs. United States, 245 Fed. 112;

Thlinket Packing Co. vs. United States,
236 Fed 109;

Zoline Federal Criminal Law and Procedure,
Sec. 422.

A motion in arrest of judgment, if made, but not shown in the Bill of Exceptions, nor in the record prepared in accordance with the amended praecipe therefor, is not before the Appellate Court and cannot be reviewed. Such a motion is not reviewable.

Andrews vs. United States, 224 Fed. 418;

Beyer vs. United States, 251 Fed. 39.

Similarly a motion for a new trial not shown in the record, nor included in the Bill of Exceptions is not before the Appellate Court. Such a motion is not reviewable.

Lueders vs. United States, 210 Fed. 419,
127 C. C. A. 151;

Ryan, et al., vs. United States, 283 Fed.
975.

Proof of the possession of large quantities of narcotic drugs in unstamped packages is sufficient, if unexplained, to sustain a verdict that the defendant was a dealer or distributor.

Pierriero vs. United States, 271 Fed. 912;

Bran vs. United States, 282 Fed. 271.

ARGUMENT.

ASSIGNMENT OF ERROR NO. 1.

Sufficiency of Indictment; Failure to Negative Exemptions.

The first assignment of error is to the effect that "the Court erred in overruling defendant's demurrer interposed to said indictment in said cause."

Plaintiff in error defends this assignment on the single ground that the indictment is defective in that it "does not allege that the defendant is not of the class exempted by the statute."

The indictment in this case was brought under that provision of the Act of December 17, 1914, as

amended, and now contained in Compiled Statutes, Annotated, Supp. 19, 6287G, reading as follows:

“It shall be unlawful for any person required to register under the provisions of this act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.”

Section 8 of the Act of December 17, 1914, 38 Stat. 789, reads as follows:

“That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act: Provided, That this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist or veterinary surgeon registered under this Act; or to to any United States, State, County, Municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: Provided,

further, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant.”

It will be noted that Section 8 of the Act just above quoted makes possession or control of narcotic drugs presumptive evidence of a violation of section one of the Act, the section under which the indictment in this case was brought. It will be further noted that by the concluding provisions of said Section 8, it is specifically made unnecessary to “negative any of the foregoing exemptions in any complaint, information, indictment or other writ or proceeding laid or brought under this Act.”

It further definitely places upon the defendant the burden of proving that he comes within any exemption should he desire to claim that to be the case.

The defendant in error cites but a single case in support of his position, namely, the case of *United States vs. Woods*, 224 Fed., page 278. Without discussing the merits of that particular decision, which was a ruling on demurrer by a District Court, it is respectfully submitted that the decision does not correctly state the law.

The case of *Pierriero vs. United States*, decided in the Circuit Court of Appeals for the Fourth Cir-

cuit and reported in 271 Fed. 912, is exactly in point on this question. In that case, the Court used the following language:

“It is also contended that to convict under the amended section it must be alleged and proved ‘that the accused is one of those persons required to register and pay the special tax’, even if untaxed and unstamped drugs be found in his possession. We are not of that opinion. The clause above quoted includes, not only those who purchase, but also those who sell and dispense, and the latter are specifically required to register and pay the special tax. Therefore an indictment in the language of the statute, charging that defendant ‘did sell, dispense and distribute’, as in this case, alleges by necessary implication that he is within the class required to register. And if there be proof that unstamped drugs were found in his possession the cause in question creates the presumption that he has violated the amended section. The burden is then upon him to show that he is not in the class required to register, and that his possession was not unlawful, as was held to be the case in *United States vs. Wilson*, (D. D.) 225 Fed. 82.”

It will be noted that that case seems to go much farther than the case at bar. In that case, the indictment seems to have alleged merely that the defendant “did sell, dispense and distribute” and the Court held that this was sufficient to raise the “necessary implication that he is within the class required to register.” In the case at bar, the indictment not only alleged that the defendant did “deal in, dispense, sell and distribute” certain narcotic

drugs, but that he did this "without first having registered with the Collector of Internal Revenue for the District of Idaho his name and place of business and place or places where such business was to be carried on, as required by law." Clearly, this is sufficient to raise the necessary implication that the defendant in this case was within the class required to register.

The ruling of the Court in the Pierrero case was cited with approval by this Court in *Bacigalupi vs. United States*, 274 Fed. 367. See also *James vs. United States*, 279 Fed. 111.

ASSIGNMENT OF ERROR, NO. 2.

Motion for Discharge on Opening Statement.

At the close of the opening statement, attorney for defendant moved that defendant be discharged because under the statement of the prosecutor there was no testimony to the effect that defendant had actually dealt in, dispensed, sold or distributed narcotics. The denial of this motion is assigned as error, but no authority is cited in support of this position. Doubtless none could be found. It is difficult to understand, however, why a defendant who has been indicted by a grand jury should be dismissed without trial merely because the prosecutor, in his opening statement, should fail to state fully the evidence to be offered by the Government. Furthermore, under Section 8 of the statute and the decisions hereinafter cited, possession of such a

large amount of narcotics is presumptive evidence of a violation of the provisions of Section 1 of the Act under which defendant was indicted, and the opening statement clearly showed such possession.

ASSIGNMENT OF ERROR NO. 3.

Secondary Evidence of Contents of Document.

Under this assignment, objection is made to the admission of the testimony of Mr. Holtz as to the contents of a certain bill fold. (Tr. pp. 17 and 18). The evidence showed that defendant handed witness the bill fold, witness saw it, examined it and handed it back to the defendant. Under such circumstances, secondary evidence as to the contents of the bill fold was clearly competent.

In *McKnight vs. United States*, 115 Fed. 972, at page 980, the Circuit Court of Appeals for the Sixth Circuit held as follows:

“The authorities seem very clear that in such cases, where a criminating document directly bearing upon the issue to be proven is in the possession of the accused, the prosecution may be permitted to show the contents thereof, without notice to the defendant to produce it. As it would be beyond the power of the Court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents. As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he

regards it for his interest to do so. The Court, as we have seen, cannot compel a defendant in a criminal case to produce an incriminating writing. The notice would therefore be futile as a means of compelling the production of the document, and refusal to comply therewith might work injustice to the defendant in the inferences drawn from its nonproduction.”

The same court later reiterated this rule in the following language:

“Inasmuch as a defendant could not be compelled to produce any such criminating document, we held that neither notice nor demand to produce same was necessary, but that secondary evidence might be made in respect of any document which the evidence should show in the possession or under the control of the defendant.”

McKnight vs. United States, 122 Fed I, at p. 929.

In Federal case, No. 14977, Mr. Justice Baldwin of the Supreme Court, sitting at the circuit, said:

“In such cases the admission of the secondary evidence depends on tracing the original to the hands of the defendant or third person, from whom it cannot be procured and not on the question of notice. This is the rule laid down in *Rex vs. Layer*, 6 How. St. Tr. 319, and adopted in *Le Merchant’s Case*, 2 Term. R. 203, note in *Snell’s case*, 3 Mass. 82, and in *U. S. vs. Reyburn*, 6 Pet. 366, 368, 8 L. ed. 424. The evidence goes to the jury, who will decide whether the paper has been so traced. It is a legal foundation for a verdict against the defendant, as if the original had been produced,

and it is not restricted to papers which are the immediate subject of the indictment. *Rex vs. Gordon, Leach, 300, note.*”

These cases lay down the true rule which was followed by the trial court.

ASSIGNMENT OF ERROR NO. 4.

Was taking grip containing narcotics an unlawful search or seizure?

The fourth assignment of error is in regard to the testimony of the witness Holtz as to the contents of a certain pack sack and grip which were seized by him without a warrant (Tr. pp. 20 to 22). The witness Holtz was not a Federal employee, but was in the employ of the railroad company. Under the generally accepted rule in such cases, where the evidence is obtained by a state officer, police officer or some person specially employed, as in this case, and the evidence is afterwards turned over to the Federal authorities, the objection that the evidence was obtained without a search warrant will not be sustained. See *Herine vs. United States, 276 Fed. 806*, a late case decided by this Court. In that case wines and liquors were seized by city police officers upon notification of a disturbance of the peace and this Court held that the seizure of such liquors as evidence was not an invasion of the security given by the Fourth Amendment to the Constitution and that the Government had a right to use the evidence upon the trial of defendant for violating the Federal law.

This question was conclusively determined by the Supreme Court of the United States in the case of *Budeau vs. McDowell*, 256 U. S. 465, where the Court, at page 475, said:

“The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

“In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner’s property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal Government.”

These cases show that there is no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. 5.

Motion for Directed Verdict.

The motion for a directed verdict was made at the close of the Government's case and thereafter defendant called a witness and offered testimony to prove an alibi. At the close of the case, defendant did not renew his motion and it is clearly held that in such cases the motion was waived.

In *Clark vs. United States*, 245 Fed. 112, this Court made the following statement at page 114:

“Error is assigned to the denial of the motion of plaintiff in error to dismiss at the conclusion of the plaintiff's testimony. To this it is sufficient to say that the motion was waived by the introduction of evidence on behalf of the plaintiff in error, and his failure to move for an instructed verdict at the close of the evidence.”

In *Thlinket Packing Company vs. United States*, 236 Fed. 109, which was also a criminal case, this Court, at page 112, made the following statement:

“As to the questions of fact which were presented as grounds for the motion, it is sufficient to say that they were waived by the act of the plaintiff in error in thereafter proceeding to offer its testimony in defense, and by failing to renew the motion at the close of the trial. *Gould vs. United States*, 209 Fed. 730, 126 C. C. A. 454; *Sandals vs. United States*, 213 Fed. 569, 130, C. C. A. 149; *Stearns vs. United States*, 152 Fed. 900, 82, C. C. A. 48.”

See also 1 Zoline Federal Criminal Law and Procedure, Section 422. The author there states that

the rule is not applicable where there is no legal or competent evidence whatever in the record justifying the conviction, and also suggests that the amendment to Section 269 of the Judicial Code by the Act of February 26, 1919, to the effect that,

“On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.”

did not change the rule with regard to the necessity of renewing the motion for a directed verdict at the close of the evidence.

ASSIGNMENT OF ERROR, NO. 6.

Motion in Arrest of Judgment.

Neither the Bill of Exceptions, settled and allowed by the Court, nor the record prepared in accordance with the amended praecipe for transcript shows any motion in arrest of judgment. Such a motion, if actually made, cannot, therefore, be considered because it is not before the Court. Furthermore, it is settled law in this Circuit that a motion in arrest of judgment is not reviewable. See *Andrews vs. United States*, 224 Fed. 418, and *Beyer vs. United States* 251 Fed. 39.

ASSIGNMENT OF ERROR, NO. 7.

Motion for New Trial.

For the reason given in discussing assignment

No. 6, supra, the motion for a new trial cannot be considered. Such motion, if made, is not before this Court. Moreover, the law is well settled that the granting or refusing of a new trial rests in the sound discretion of the trial court and is not reviewable on writ of error. *Lueders vs. United States*, 210 Fed. 419, 127 C. C. A. 151; *Ryan, et al., vs. United States*, 283 Fed. 975.

ASSIGNMENT OF ERROR, NO. 8.

In the brief of Plaintiff in Error, there is inserted an assignment of error, under the above number, reading:

“that the Court erred in passing judgment.”

This is an assignment set out in the brief but not included in the assignment of error filed as required by Section 997 R. S. This assignment cannot, therefore, be considered, unless the Court should hold that it is a “plain error not assigned,” (Rule 24-4, this Court) which does not appear to be the case.

ASSIGNMENT OF ERROR, NO. 9.

Insufficiency of the Evidence to Support Verdict.

The brief of plaintiff in error likewise contains an assignment under this number not included in the assignment of errors filed in the court below, nor included in the transcript. It is, therefore, not before the court except as it may be included in Assignment No. 5 which has been heretofore discussed or

except as it may be regarded as a plain error not assigned. In any event, there can be no serious question of the sufficiency of the evidence to support the verdict. The evidence will be found outlined in the statement at the beginning of this brief. The one important, outstanding fact is that the defendant was in possession of a large amount of cocaine and morphine, which, as sold to the retailer, would according to the testimony of witness Cole, (Tr. p. 35), have been worth about \$16,000.00. The Court very properly instructed the jury that possession of the drugs, while under some circumstances it might be lawful, was a circumstance to be considered, and that the quantity and value had a bearing upon the question as to whether or not the possession was had in the course of dealing in, dispensing, distributing and selling such drugs. The evidence also showed from the bottles themselves that the necessary revenue stamps were not attached (Tr. p. 32) and the Court instructed the jury as to the effect to be given to this fact. These instructions are clearly in accordance with the provisions of Sections 1 and 8 of the Harrison Act, as amended, and as provided in these sections, the absence of appropriate tax paid stamps is *prima facie* evidence of a violation of Section 1 and possession of the prohibited drugs is presumptive evidence of a violation not only of Section 8 of the Act, which prohibits mere possession, but also is presumptive evidence of a violation of Section 1 under which this defendant

was charged. No exception was taken to the charge and attention is called to it for the purpose only of showing the light in which the evidence as to the possession of such a large quantity of these drugs went before the jury.

In the case of *Pierriero vs. United States*, 271 Fed. 912, the Circuit Court of Appeals for the 4th Circuit considered a similar case. A handbag was found in defendant's room containing unstamped cocaine and gum opium of the estimated value of \$60,000.00 or more, according to prices paid by addicts. The Court left it to the jury to determine whether or not the bag was actually in the possession of the defendant. The Court held, as we have before pointed out, that the indictment sufficiently charged defendant with selling, dispensing and distributing and the trial court's instruction to the effect that the possession of this large amount of drugs not in the original stamped package was prima facie evidence of purchase, sale and dispensing was upheld by the Appellate Court.

In *Bram vs. United States*, 282 Fed. 271, (C. C. A. 8th Circuit) the defendant was charged as a dealer or distributor. His entire defense was that the grips containing thirty-five ounces of morphine and seventy-five ounces of cocaine did not belong to him and the Court said:

“The unexplained possession of such an amount of these drugs under the circumstances

shown by the evidence was ample to sustain a verdict that accused was a dealer or distributor within the section.”

For all of the reasons hereinbefore given it is clear that the verdict and judgment should be sustained.

Respectfully submitted,

E. G. DAVIS,

*United States Attorney
for the District of Idaho.*

J. H. McEVERS,

*Assistant United States
Attorney.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEONG SHEE,

Appellant,

vs.

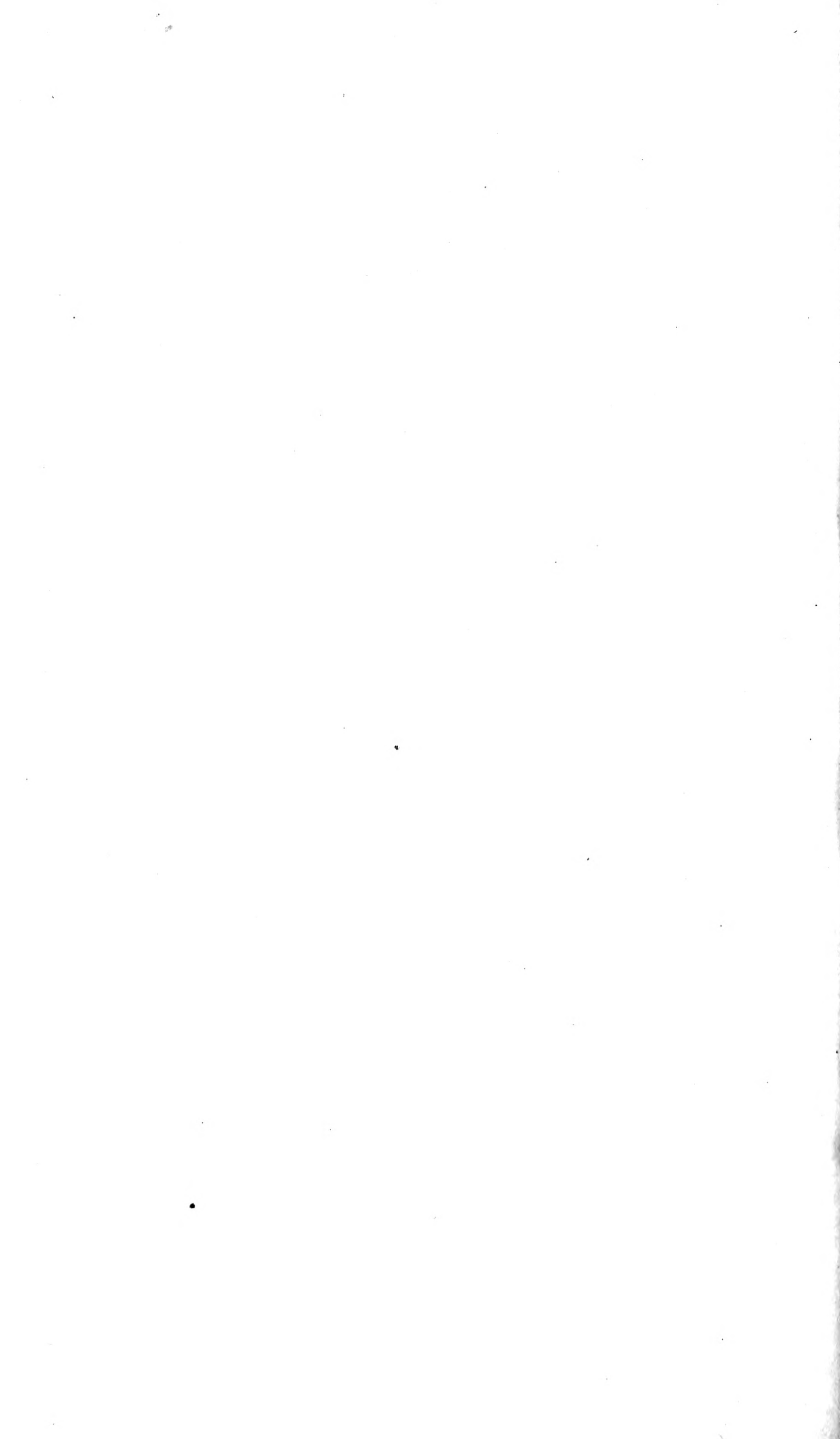
EDWARD WHITE, as Commissioner of Immigration
for the Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED

SEP 24 1923



United States
Circuit Court of Appeals
For the Ninth Circuit.

LEONG SHEE,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration
for the Port of San Francisco,
Appellee.

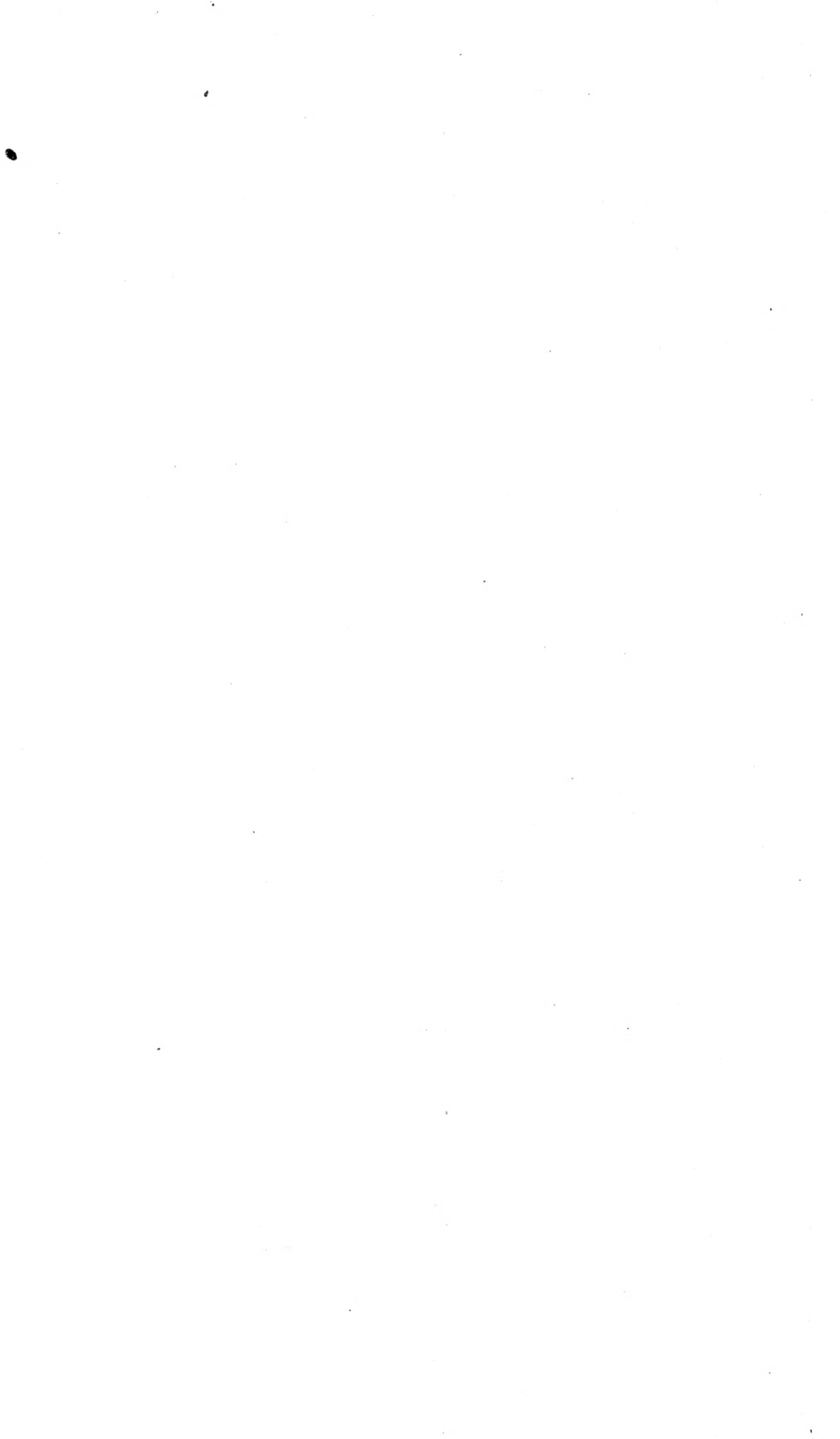
Transcript of Record.

Upon Appeal from the Southern Division of the
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names of Attorneys of Record.

For Petitioner and Appellant:

GEORGE A. MCGOWAN, Esq., San Francisco,
Cal.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Fran-
cisco, Cal.

In the Southern Division of the United States
District Court in and for the Northern District
of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE, on Habeas Cor-
pus.

Praeceptum for Transcript on Appeal.

To the Clerk of said Court:

Sir: Please make transcript of appeal in the
above-entitled case, to be composed of the following
papers, to wit:

1. Petition for writ.
2. Order to show cause.
3. Demurrer.
4. Minute order introducing immigration record
at the hearing on demurrer.
5. Judgment and order denying petition.
6. Notice of appeal.
7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.

10. Citation on appeal.
11. Stipulation and order respecting immigration record.
12. Clerk's certificate.

GEO. A. MCGOWAN,
Attorney for Petitioner.

Service of the within praecipe and receipt of a copy thereof is hereby admitted this 4th day of May, 1923.

JOHN T. WILLIAMS,
U. S. Attorney.

[Endorsed]: Filed May 4, 1923. Walter B. Mal-
ing, Clerk. By C. W. Galbreath, Deputy Clerk.
[1*]

In the Southern Division of the United States
District Court in and for the Northern District
of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE, 16,516/3-4 Ex
SS. "Tjikembang," September 15, 1917, on
Habeas Corpus.

Petition for Writ.

To the Honorable, United States District Judge,
now presiding in the United States District
Court, in and for the Northern District of Cali-
fornia, First Division:

It is respectfully shown by the petition of the
Louis Him, that Leong Shee, hereafter in the peti-

*Page-number appearing at foot of page of original certified Tran-
script of Record.

tion referred to as "the detained," is unlawfully imprisoned, detained, confined and restrained of her liberty by Edward White, Commissioner of Immigration for the port of San Francisco, at the Immigration Station at Angel Island, county of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6, 1882; July 5, 1884; November 3, 1893, and April 29, 1902, as amended and reenacted by Section 5 of the Deficiency Act of April 7, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner intends to deport the said detained away from and out of the United States to the Republic of China. [2]

That the Commissioner claims that the detained arrived at the port of San Francisco on or about the 15th day of September, 1917, on the SS. "Tjikembang," and thereupon made application to enter the United States as the wife of your petitioner, a native-born citizen of the United States, and that in the examination of the said application it was found and conceded by the said Commissioner that your petitioner was and is a native-born citizen of the United States, but the evidence so presented upon behalf of the said detained was deemed and held

to be insufficient to establish the existence of the relationship of husband and wife between your petitioner and the said detained; and upon September 28, 1917, a conditional denial was entered of the said application upon said ground; and under the rules as then existing a copy of the entire record was loaned to Messrs. McGowan & Worley, the then attorneys for the detained, for their information as to why the evidence so presented was deemed insufficient, and the then attorneys for the said detained did on October 2, 1917, apply to the said Commissioner requesting a reconsideration of the said case, and that the applicant be landed upon parole so that she might go to the home of her husband, the petitioner herein, at Tucson, Arizona; and in compliance with said request the said Commissioner did, on October 10, 1917, order the detained landed upon parole.

That the said Commissioner thereafter caused an examination to be made of certain witnesses in Canton, China, which said examination was conducted presumably during the month of August, 1919; and that thereafter, and upon September 24, 1919, a Board of Special Inquiry entered a conditional denial of the application of the said detained to enter the United States and allowed ten days' further time within which to produce any additional evidence which might be available upon behalf of the said detained, and notice thereof was forwarded to the attorneys for the said detained [3] upon September 24, 1919, but the Chinese Rules and Regulations having been changed in the interim, an

inspection of the record of the immigration record was withheld from the attorneys for the detained; and that thereafter, and upon October 20, 1919, the attorneys for the detained protested to the Commissioner against the withholding of the record from their inspection, and because of said fact were unable to state that they had any additional evidence to submit; that the matter was held in abeyance to permit the detained to submit additional evidence; and thereafter, and upon January 6, 1920, additional evidence was presented upon behalf of the detained, consisting of affidavits of a large number of witnesses who were residents of Tucson, Arizona, which said evidence was duly received and upon January 15, 1920, the said witnesses were all examined at Tucson, Arizona; and that thereafter, and on February 26, 1920, a final denial was entered and the application of the said detained to enter the United States, the reason for the denial being that though your petitioner, the said Louie Him, was found and conceded to be a native-born citizen of the United States, and though this detained was found to be living with your petitioner in the relationship of husband and wife, and that admittedly they had so lived ever since 1908, that the said detained was, in point of law, not the only wife of your petitioner, for the reason that he had formerly been married to another woman, who was still living in China, where she had always resided.

That upon the 27th day of February, 1920, the said Commissioner revoked the parole of the said detained and requested that she be returned into

custody. That thereafter, and upon the 1st day of March, 1920, an appeal was taken to the Secretary of Labor from said excluding decision, and then, for the first time access was had by the attorneys for the detained to the record [4] of the hearing before the Board of Special Inquiry, and then, for the first time, the existence of testimony taken in China was made known to the legal representatives of the said detained.

That on or about March 25, 1920, the detained arrived in San Francisco, and upon April 1, 1920, the Commissioner of Immigration continued the parole of the said detained providing she remained in San Francisco; and thereafter, and during the month of May, 1920, and after your petitioner and the detained had examined the testimony heretofore taken in China, they filed their affidavits with the said Commissioner setting forth the facts to be that your petitioner was first married in 1891 to Wong Shee, and that eleven years thereafter, or in 1902, they separated according to the laws and customs of the Chinese Empire, which was the place of residence and domicile at that time of your petitioner and his then wife, Wong Shee, and dissolved the marriage then and there existing between them by your petitioner taking his children and returning them to his parents, and by returning his then wife, Wong Shee, to her parents, and that he had never since that time, that is, since 1902, seen or heard from his former wife, the said Wong Shee, and that the said separation, by the mutual consent of the said parties was, under the laws and customs of

China, an absolute divorce, and that your petitioner was thereafter a single man and remained such until 1907, when your petitioner was married to this detained, Leong Shee, and that your petitioner had ever since said time continuously maintained his marital relationship with the detained, the said Leong Shee, as his wife.

Your petitioner further alleges that upon June 3, 1920, the Secretary of Labor enlarged the parole agreement extended to the said detained and permitted her to return to Tucson, Arizona, where she had formerly lived, and where she had given birth to the [5] first child of your petitioner and the said detained, namely (Pansy) Louie Lai Sui, who was born at Tucson on March 17, 1919; and that thereafter upon June 8, 1920, there was born the second child to your petitioner and the said detained at San Francisco, namely (Viola), Louie Lai Fung. That on or shortly after March 1, 1921, the said appeal heretofore mentioned was submitted for final decision before the Secretary of Labor, and was dismissed by that official upon March 5, 1921; that upon October 8, 1921, there was born to your petitioner and the said detained, at Tucson, the third child, namely (Orchid), Louie Lai Toy.

Your petitioner further alleges that it is conceded by the said Commissioner that upon August 4, 1921, there was filed and presented to the said Commissioner a petition and request for the reopening and reconsideration of this case, submitting affidavits as a foundation for the introduction of further and material testimony, the affidavits being by Louie

Bing, a son of your petitioner by his first wife, the said Wong Shee, wherein he set forth the facts of her death in China when he was ten years of age, and that his father, your petitioner, had no other wife at the time of his marriage to Leong Shee, and that said marriage occurred after the death of his first wife, Wong Shee. The second proposed witness' affidavit is that of Louie Foon, who stated that he was present at the time of the marriage in China of your petitioner to the said detained, Leong Shee, and that he assisted in the marriage ceremony, which was performed according to the Chinese custom. The third proposed new witness, Low Yeun, stated that he had known your petitioner for more than thirty years, attesting further that he knew and had heard of the death of your petitioner's first wife, Wong Shee, about five years prior to the marriage of your petitioner to this detained, Leong Shee. There was further submitted as part and parcel of [6] said petition for the reopening and reconsideration of this case, the birth certificates of the first and second of the children hereinbefore mentioned, and calling attention to the then pregnant condition of this detained, which finally terminated in the birth of the third child set forth in this petition.

Your petitioner alleges that said rehearing and reconsideration were refused on August 5, 1921. Your petitioner further alleges that the said detained is now in custody with the Commissioner of Immigration for the purpose of deporting her to China; that it is the intention of the said Com-

missioner to deport the said detained to the Republic of China by the SS. "Tjileboet," sailing from this port on Saturday, July 15th. That she will be taken away from your petitioner, the man who admittedly has maintained the relation of husband toward her for the last fifteen years, and to whom she has borne, upon American soil, three native-born citizens of the United States, all as hereinbefore in this petition set forth, each of which American-born citizens are of young and tender years and in need of the constant care and attention of their mother, and are now with her in detention at Angel Island.

Your petitioner alleges that the finding of the said Commissioner and the said Board of Special Inquiry, and the said Secretary of Labor, is based upon the fact that your petitioner was previously married in China to Wong Shee, and though there is no evidence presented to show that your petitioner had ever seen or lived with the said Wong Shee since his separation from her in 1902 in China, and it was, and is, conceded that the said Wong Shee had never resided in the United States or any place other than the Empire, and later, the Republic of China, where she was at all times subject to the laws and jurisdictions of that country, and where your petitioner was a resident at the time of his marriage and separation from the said Wong Shee, and within its jurisdictions and subject to its then laws, and it being [7] further conclusively established by the evidence and conceded that your petitioner married the said detained in the Empire of China, while your petitioner and the said detained

were residents thereof, in 1907, when they were both subject to its laws and jurisdiction, and that the said marriage was legal and in accordance with the laws and customs of that country, whether your petitioner's first wife was then dead or alive, or whether the marriage theretofore existing between them was then and there in full force and effect or dissolved by a separation or divorce according to the customs of the country in which the parties to this proceeding then resided; and that the decision denying the right of the detained to enter the United States, of the said Commissioner and the said Board of Special Inquiry, and the said Secretary of Labor, is based upon the conclusion as contained in said decisions and each thereof, that the said detained is the plural or concubine wife of your petitioner and therefore not his legal wife, and hence inadmissible into the United States, notwithstanding the further admitted facts that the said Wong Shee, who was the first wife of your petitioner, is not now, and never has been, a resident of, or within the jurisdiction of, or ever applied for admission into the United States.

But, on the contrary, your petitioner alleges on his information and belief, that the hearings and proceedings had herein by and before the said Commissioner, the said Board of Special Inquiry, and the said Secretary of Labor, and the action of each thereof, was and is in excess, and an abuse of the authority committed to them by the rules and regulations, and by the said statutes, and that the denial of the application of the said detained to enter the

United States as the wife of a native-born citizen thereof, was, and is, an abuse of the authority committed to them by the said statutes, and that, your petitioner alleges upon his information and belief, it was an abuse of the official [8] discretion of the said Commissioner to refuse to receive the testimony of the three proposed witnesses whose affidavits were presented to the said Commissioner together with the petition or request for a rehearing on or about August 4, 1921, all as hereinbefore set forth on pages 5 and 6 of this petition, and by such action preventing the detained from having the benefit of positive and affirmative testimony of witnesses which would show conclusively, according to the information and belief of your petitioner, that his first wife, Wong Shee, was dead at the time of the marriage of your petitioner to this detained, and that the establishment of said fact would have shown the admissibility of this detained into the United States, even under the law as construed by the said Commissioner, the said Board of Special Inquiry, and the said Secretary of Labor, and that such action has prevented the detained from having a full and fair opportunity to present evidence in her own behalf showing her admissibility into the United States, and she is, as a result thereof, deprived of her liberty without due process of law.

Your petitioner further alleges upon his information and belief, that the action of the said Commissioner, the said Board of Special Inquiry, and the said Secretary of Labor, in denying admission into the United States of the said detained was done and

arrived at, according to the information and belief of your petitioner, by misconstruing the point of law involved, namely, it being conceded that your petitioner is a native-born citizen of the United States, and that he has maintained the relationship of husband and wife with this detained since 1907, the said marriage having been legal and valid within the Empire of China, where the same was contracted, your affiant never having had, and now having no other wife within the United States, that the said detained is, in point of law, entitled to admission into the United States as the wife of your petitioner, irrespective of the [9] fact as to whether Wong Shee, the nonresident first wife of your petitioner, was living or dead at the time of the marriage of the said detained to your petitioner, or at the time of the application for admission into the United States of the said detained.

Your petitioner further alleges, upon his information and belief, that the said Commissioner, the said Board of Special Inquiry, and the said Secretary of Labor, have misconstrued the force and effect of the evidence submitted in said matter, and misconstrued the law and made a mistake of law in not concluding and finding from the evidence submitted in this case that, according to the law of domicile of your petitioner, Louie Him, and his first wife, Wong Shee, at the time of their marriage and during the time of their residence together as husband and wife in China, that the said marriage was absolutely dissolved and terminated by mutual consent and divorce by the said husband, your peti-

tioner, leaving and separating from his former wife, Wong Shee, and returning her to her people, and that said action upon the part of your petitioner was in law and in fact according to the law of the then domicile of your petitioner and his then wife, an absolute divorce, and left him in the status of a single and unmarried man, and eligible to contract and enter his second marriage with this detained.

Your petitioner further alleges, upon his information and belief, that it was an abuse of the authority committed to the said Commissioner, the said Board of Special Inquiry, and the said Secretary, in not finding that this detained as the second wife of your petitioner, was entitled to admission into the United States, your petitioner being a citizen of the United States now domiciled therein, and having no wife resident or domiciled therein.

That your petitioner has not in his possession a full copy [10] of the said proceedings had before the said Commissioner, and the said Board of Special Inquiry, and the said Secretary, and it is for said reason impossible for your petitioner to annex hereto a full copy of the said immigration records; but your petitioner is willing to incorporate as part and parcel of his petition, the said immigration record when the same shall have been received from the Secretary of Labor at Washington, and shall have it presented to this Court at the hearing to be had hereon.

That it is the intention of the said Commissioner to deport the said detained and her three American-born children out of the United States and away

from the land of which the detained's husband and their three said minor children are citizens, by the SS. "Tjileboet," sailing from the port of San Francisco upon the 15th day of July, 1922, at 1 P. M., and unless this Court intervenes to prevent said deportation the said detained will be deprived of residence within the land of which her husband and their three children are citizens.

That the said detained is in detention, as aforesaid, and for said reason is unable to verify this said petition upon her own behalf and for said reason petition is verified by your petitioner, but for and as the act of the said detained, and his own behalf as the husband of the said detained.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus issued herein as prayed for, directed to the said Commissioner commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of her detention, so that the same may be inquired into to the end that the said detained may be restored to her liberty and go hence without day. [11]

Dated at San Francisco, California, July 12th, 1922.

LOUIE HIM.

GEO. A. MCGOWAN,

Attorney for Petitioner,

550 Montgomery Street,

San Francisco, Calif. [12]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Louie Him, being first duly sworn, according to law deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the said is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

LOUIE HIM.

Subscribed and sworn to before me this 12th day of July, 1922.

[Seal]

HARRY L. HORN,
Notary Public.

[Endorsed]: Filed Jul. 14, 1922, W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[13]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE 16,516/3-4 Ex SS. "Tjikembang," September 15, 1917, on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition on file herein:

IT IS HEREBY ORDERED that Edward White, Commissioner of Immigration for the Port of San Francisco, appear before this Court on the 15th day of July, 1922, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein as prayed for, and that a copy of this order be served upon the said commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of the said Commissioner of the Secretary of Labor, shall have the custody of the said Leong Shee, are hereby ordered and directed to retain the said Leong Shee within the custody of the said Commissioner of Immigration, and within the jurisdiction of this Court until its further order herein.

Dated at San Francisco, California, July 14th, 1922.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jul. 14, 1922. W. B. Mal-
ling, Clerk. By C. M. Taylor, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statement of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Aug. 12, 1922. W. B. Mal-
ing, Clerk. By T. L. Baldwin, Deputy Clerk. [15]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 12th day of August, in the year of our Lord, one thousand nine hundred and twenty-two. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 17,605.

In the Matter of LEONG SHEE on Habeas Cor-
pus.

**Minutes of Court—August 12, 1922—Hearing on
Demurrer.**

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. Geo. A. McGowan, Esq., was present for and on behalf of petitioner and detained. P. A. Robbins, Esq., was present for and on behalf of respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the immigration records be filed as Respondent's Exhibits "A," "B," "C," "D," "E," "F" and "G," and that the same be considered as part of the original petition. After argument by the respective attorneys, the Court ordered that said matter be and the same is hereby submitted.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE, on Habeas Corpus.

(Order Sustaining Demurrer.)

GEORGE A. MCGOWAN, Esq., Attorney for Petitioner.

JOHN T. WILLIAMS, Esq., United States Attorney, and

BEN F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

Memorandum.

RUDKIN, District Judge.—On the grounds of public policy the courts of this country will not recognize plural marriages or the right of Chinese subjects to terminate the marriage relation by agreement or at will. The relationship upon which the right to remain in this county is based has not been established and the demurrer is therefore sustained.

August 16th, 1922.

[Endorsed]: Filed Aug. 16, 1922. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.

[17]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE, 16,516/3-4 Ex SS. "Tjikembang," September 15, 1917, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the Honorable John T. Williams, United States Attorney for the Northern District of California:

You, and each of you, will please take notice that Leong Shee, the petitioner and the detained above named, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, from the order and judgment made and entered herein on the 16th day of August, 1922, sustaining the demurrer to and in denying the petition for writ of habeas corpus filed herein.

Dated at San Francisco, California, September 6th, 1922.

GEO. A. MCGOWAN,
Attorney for Petitioner and Appellant Herein.

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE, 16,516/3-4 Ex SS. "Tjikembang," September 15, 1917, on Habeas Corpus.

Petition for Appeal.

Now comes Leong Shee, the petitioner and the appellant herein, and says:

That on the 16th day of August, 1922, the above-entitled Court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in her behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof; and further, that the said detained may remain at large upon the bond heretofore given by her in this matter during the

pendency of the appeal herein, so that she may be produced in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, September 6th, 1922.

GEO. A. MCGOWAN,
Attorney for Petitioner and Appellant Herein.
[19]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE, 16,516/3-4 Ex. SS. "Tjikembang," September 15, 1917, on Habeas Corpus.

Assignment of Errors.

Comes now Leong Shee, by her attorney, Geo. A. McGowan, Esq., in connection with her petition for an appeal herein, assigns the following errors which she avers occurred upon the trial or hearing of the above-entitled cause, and upon which she will rely, upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First. That the Court erred in denying the petition for a writ of habeas corpus herein.

Second. That the Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

Third. That the Court erred in sustaining the demurrer and in denying the petition of habeas corpus herein and remanding the petitioner to the custody of the immigration authorities for deportation.

Fourth. That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of the petitioner from custody as prayed for in said petition.

Fifth. That the judgment made and entered herein is contrary to law. [20]

Sixth. That the judgment made and entered herein is not supported by the evidence.

Seventh. That the judgment made and entered herein is contrary to the evidence.

WHEREFORE, the appellant prays that the judgment and order of the Southern Division of the United States District Court for the Northern District of the State of California, First Division, made and entered herein in the office of the Clerk of the said Court on the 16th day of August, 1922, discharging the order to show cause, sustaining the demurrer and in denying the petition for a writ of habeas corpus, be reversed, and that this cause be remitted to the said lower court with instructions to issue the writ of habeas corpus, as prayed for in said petition.

Dated at San Francisco, California, September 6th, 1922.

GEO. A. MCGOWAN,
Attorney for Petitioner and Appellant Herein.

Service of the within notice of appeal, petition for appeal and assignment of errors and receipt of a copy of each thereof is hereby admitted this 11th day of Sept. 1922.

JOHN T. WILLIAMS,
U. S. Atty., Per G.

[Endorsed]: Filed Sep. 11, 1922. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [21]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE, 16,516/3-4 Ex. SS. "Tjikembang," September 15, 1917, on Habeas Corpus.

Order Allowing Petition for Appeal (And Continuing on Bond).

On this 11th day of September, 1922, comes Leong Shee, the detained herein, by her attorney, Geo. A. McGowan, Esq., and having previously filed herein, did present to this Court, her petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by her, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals

for the Ninth Circuit, and further praying that the detained may remain at large upon the bond previously given herein upon her behalf, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and orders execution and remand stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, and that the said detained may remain at large upon the bond previously given upon her behalf during the further proceedings to be had herein and that she be required to surrender herself in execution of whatever judgment is finally entered herein at the termination of said appeal.

Dated at San Francisco, California, September 11, 1922.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Service of the within order allowing appeal and continuing on bond and receipt of copy thereof is hereby admitted this 11th day of Sept., 1922. [22]

JOHN T. WILLIAMS,
U. S. Atty., Per G.

Filed Sep. 11, 1922. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [23]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

In the Matter of LEONG SHEE, on Habeas Corpus.

Stipulation and Order Respecting Withdrawal of Immigration Record.

IT IS HEREBY STIPULATED AND AGREED by and between the attorney for the petitioner and appellant herein, and the attorney for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this court.

Dated at San Francisco, California, May 4th, 1923.

GEO. A. MCGOWAN,

Attorney for Petitioner and Appellant.

JOHN T. WILLIAMS,

United States Attorney for the Northern District of California,

Attorney for Respondent and Appellee. [24]

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said Immigration record therein referred to, may be withdrawn from the office of the clerk of this court and filed in the office of the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this court.

JOHN S. PARTRIDGE,
United States District Judge.

Dated at San Francisco, California, May 4th,
1923.

[Endorsed]: Filed May 4, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[25]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 25 pages, numbered from 1 to 25, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the Matter of Leong Shee, on Habeas Corpus, No. 17,605, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on

appeal and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Nine Dollars and Forty Cents (\$9.40), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal issued herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of May, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [26]

United States of America,—ss.

The President of the United States, to Edward White, Commissioner of Immigration for the Port of San Francisco, and John T. Williams, United States Attorney for the Northern District of California, His Attorney Herein,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court

for the Southern Division of the Northern District of California, First Division, wherein Leong Shee is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States Circuit Judge for the Circuit Court of Appeals for the 9th Circuit this 10th day of February, A. D. 1923.

FRANK H. RUDKIN,
United States Circuit Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this 9th day of February, 1923.

J. T. WILLIAMS,
U. S. Attorney for Appellee.

This is to certify that a copy of the within citation on appeal was lodged with me as the Clerk of this court upon the 9th day of February, 1923.

[Seal] WALTER B. MALING,
Clerk U. S. Dist. Court in and for the Nor. Dist.
of Calif., at San Francisco.

By C. W. Calbreath,
Deputy.

[Endorsed]: No. 17,605. United States District Court for the Southern Division of the Northern District of California, First Division. In re: Leong Shee, on Habeas Corpus, Appellant, vs. Edward White, Commissioner of Immigration for

the Port of San Francisco, Appellee. Citation on Appeal. Filed Feb. 10, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

[Endorsed]: No. 4031. United States Circuit Court of Appeals for the Ninth Circuit. Leong Shee, Appellant, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 15, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

LEONG SHEE, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

**Order Enlarging Time to and Including May 7,
1923, to File Record and Docket Cause.**

Good cause appearing therefor and upon motion of Geo. A. McGowan, Esq., attorney for appellant herein:

IT IS HEREBY ORDERED that the time within which to docket the appeal herein in the office of the clerk of the United States Circuit Court for the Ninth Circuit may be, and the same is hereby extended for thirty days from and after the date hereof.

Dated at San Francisco, California, April 9th, 1923.

FRANK H. RUDKIN,
Judge of the United States Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: No. 4031. United States Circuit Court of Appeals for the Ninth Circuit. Leung Shee, on Habeas Corpus, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, Appellee. Order Enlarging Time to and Including May 7, 1923, to File Record and Docket Cause. Filed Apr. 9, 1923. F. D. Monckton, Clerk. Refiled May 16, 1923. F. D. Monckton. Clerk.

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

LEONG SHEE, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

Order Enlarging Time to and Including April 9, 1923, to File Record and Docket Cause.

Good cause appearing therefor and upon motion of Geo. A. McGowan, Esq., attorney for appellant herein:

IT IS HEREBY ORDERED that the time within which to docket the appeal herein in the office of the clerk of the United States Circuit Court for the Ninth Circuit may be, and the same is hereby extended to and including April 9, 1923.

Dated at San Francisco, California, March 10th, 1923.

WM. B. GILBERT,

Judge of the United States Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: No. 4031. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including — 192— to File Record and

Docket Cause. Filed Mar. 10, 1923. F. D. Monckton, Clerk. Refiled May 16, 1923. F. D. Monckton, Clerk.

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,605.

LEONG SHEE, on Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

Order Extending Time Thirty Days to File Record and Docket Cause.

Good cause appearing therefor, and upon motion of Geo. A. McGowan, Esq., attorney for Appellant herein:

IT IS HEREBY ORDERED that the time within which to docket the appeal herein in the office of the clerk of the United States Circuit Court for the Ninth Circuit may be, and the same is hereby extended for thirty days from and after the date hereof.

Dated at San Francisco, California, May 8, 1923.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals, Ninth Circuit.

Service of the within order and receipt of a copy thereof is hereby admitted this 8th day of May, 1923.

JOHN T. WILLIAMS,
United States Attorney.
OLENA M. MYERS,
Asst. U. S. Atty.

[Endorsed]: No. 4031. United States Circuit Court of Appeals for the Ninth Circuit. Leong Shee, on Habeas Corpus, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, Appellee. Order Extending Time to File Record and Docket Cause. Filed May 8, 1923. F. D. Monckton, Clerk. Refiled May 16, 1923. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

C. W. YOUNG COMPANY, a Corporation,
Plaintiff in Error,

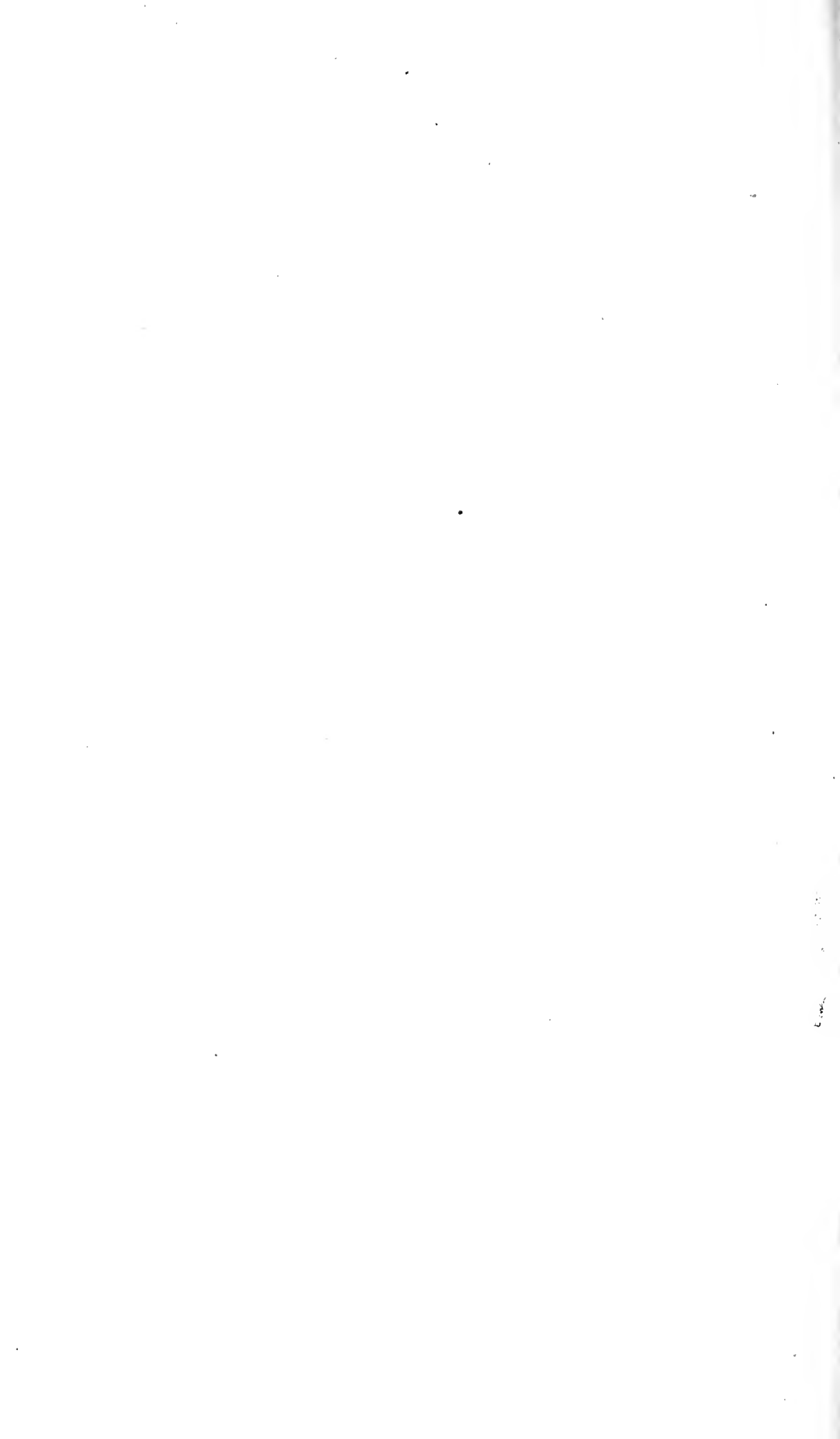
vs.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Defendant in Error.

VOLUME I.
(Pages 1 to 288, Inclusive.)

Upon Writ of Error to the United States District Court of the
Territory of Alaska, Division Number One, at Juneau.

FILED
JUN 18 1923
F. D. MONTGOMERY



United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

C. W. YOUNG COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Defendant in Error.

Defendant in Error.

VOLUME I.

(Pages 1 to 288, Inclusive.)

Upon Writ of Error to the United States District Court of the
Territory of Alaska, Division Number One, at Juneau.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

H. L. FAULKNER, Esq., Juneau, Alaska,
Attorney for Plaintiff in Error.

WINN & OOGHE, Juneau, Alaska, and COONEY
& KELLEY, Los Angeles, California,
Attorneys for Defendant in Error.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Complaint.

Plaintiff complains of the above-named defendant and for a first cause of action alleges:

I.

That the above-named plaintiff is now, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of California and qualified to do, and doing business, in the Territory of Alaska, and that during all the times hereinafter mentioned it complied with all of the laws, rules and regulations pertain-

ing to foreign corporations doing business in Alaska, and paid all of its tax license as is required by the statutes of the Territory of Alaska.

II.

That C. W. Young Company, the above-named defendant, is now, and at all times hereinafter mentioned has been, a corporation duly organized and existing under the laws of the Territory of Alaska with its head office at Juneau, Alaska, and doing business in said town and vicinity. [1*]

III.

That on or about the 14th day of February, A. D. 1917, the above-named plaintiff entered into a written contract with the above-named defendant, a copy of which said contract is hereto attached and marked Exhibit "A" and made a part of this complaint as fully as if the same was set forth herein. That both plaintiff and defendant herein acted upon and under the terms and conditions of said contract and in all respects ratified the same and carried out the terms and conditions thereof and acted thereunder from the said 14th day of February, 1917, up to and including the 31st day of August, 1918.

IV.

That under and by virtue of said contract and agreement, and during the years 1917 and 1918, this plaintiff sold and delivered to said defendant at its place of business in or near Juneau, Alaska, and at the special instance and request of the said

*Page-number appearing at foot of page of original certified Transcript of Record.

defendant, goods, wares and merchandise, amounting to the agreed and reasonable price of \$5619.34. That said goods, wares and merchandise consisted of refined oils, lubricating oils, greases and containers. That under said contract and agreement for the sale and delivery of said merchandise the said defendant was entitled to a commission of \$281.95 which was duly paid to said defendant, and out of the sale of the said \$5619.34 worth of merchandise made by the said defendant, the said defendant only paid to this plaintiff the sum of \$1599.22 and after deducting said amount from the goods, wares and merchandise so furnished to said defendant by this plaintiff and deducting said commission as above stated, it left a balance due and owing to this plaintiff from said defendant of \$3738.17, no part of which latter sum has been paid to this plaintiff by said defendant, although [2] demand has been made therefor, and said sum is long past due.

V.

That said sum of \$3738.17 became due and owing from said defendant to this plaintiff on the 10th day of September, 1918, and this plaintiff is entitled to interest thereon at the rate of eight per cent per annum from said last mentioned date.

And for a second cause of action against said defendant, this plaintiff alleges:

I.

That the above-named plaintiff is now, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the

State of California and qualified to do, and doing, business in the Territory of Alaska, and that during all the times hereinafter mentioned it complied with all the laws, rules and regulations pertaining to foreign corporations doing business in Alaska, and paid all of its tax license as is required by the statutes of the Territory of Alaska.

II.

That C. W. Young Company, the above-named defendant, is now, and at all times hereinafter mentioned has been, a corporation duly organized and existing under the laws of the Territory of Alaska with its head office at Juneau, Alaska, and doing business in said town and vicinity.

III.

That on or about the 5th day of October, 1918, this plaintiff sold and delivered to the defendant at its special instance and request, goods, wares and merchandise of the reasonable and agreed [3] worth and value of \$2578.31.

IV.

That said defendant has not paid to this plaintiff and portion or part of the said sum of \$2578.31 although the same has been long since past due and demand made for the payment thereof, and said sum is now due and owing from the defendant to this plaintiff, together with interest thereon at the rate of eight per cent per annum from the 10th day of November, 1918.

WHEREFORE plaintiff prays judgment against this defendant for the sum of Thirty-seven Hundred Thirty-eight and 17/100 (\$3738.17) Dol-

lars, together with interest thereon at the rate of eight per cent per annum from the 10th day of September, 1918, and also for the sum of Twenty-five Hundred Seventy-eight and 3/100 (\$2578.31) Dollars, with interest thereon at the rate of eight per cent per annum from the 10th day of November, 1918, together with the costs and disbursements of this action.

COONEY & KELLY,
JNO. R. WINN,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,
Division Number One,—ss.

John R. Winn, being duly sworn, on oath deposes and says: I am one of the attorneys for the plaintiff in the above-entitled action; that I have read over and know the contents of the foregoing complaint, and verily believe the facts set forth therein are true. That I make this verification on the part and in behalf of the plaintiff corporation herein for the reason that at the present time there is no officer or agent of said corporation within the Territory of Alaska.

JNO. R. WINN.

Subscribed and sworn to before me this 8th day of October, 1920.

[Notarial Seal] ARTHUR OOGHE,
Notary Public for the Territory of Alaska, Residing at Juneau.

My commission expires April 8, 1923. [4]

Exhibit "A."**MEMORANDUM OF AGREEMENT**

THIS AGREEMENT, made and entered into this 14th day of February, 1917, by the UNION OIL COMPANY OF CALIFORNIA, a corporation duly organized under the laws of the state of California, party of the first part, and (name) C. W. YOUNG COMPANY, of (Town) Juneau, (State) Alaska, party of the second part,

WITNESSETH:

(1) The first party hereby appoints the second party as its agent for the sale of its products as follows: (Insert list of products to be sold.)

Gasoline,
Kerosene,
Distillate,
Lubricating oils,
Lubricating Greases.

(2) In the following described territory, Juneau, Alaska.

(3) It is mutually understood and agreed by the parties hereto that the second party's authority so far as the first party is concerned is strictly limited to the terms and conditions set forth and made a part of this contract.

DELIVERIES.

(4) The first party agrees to deliver the above described products to the second party f. o. b. Juneau, Alaska, same to be in tank cars, iron barrels, drums, cases or packages, and for the ordinary

requirements of the territory referred to in Clause 2.

SALES.

(5) It is understood and agreed by the parties hereto that all sales made by the second party shall be for cash on delivery, and in accordance with the written prices furnished by the first party. No deliveries are to be made on credit to be carried by the party of the first part without written authority from the first party.

REPORTS.

(6) The second party further agrees to render such reports of the business transacted under this contract as may be required by the first party. [5]

EQUIPMENT.

(8) It is understood and agreed that the second party will make all retail deliveries and that all shipments made by the first party to said second party, are to be promptly and properly accounted for by said second party, and that any loss in excess of 2% which may occur by leakage or otherwise after delivery by first party as herein specified, shall be paid for by the second party within ten (10) days after the close of each month's business.

(9) It is understood and agreed that the said second party shall furnish at his expense, such storage facilities as may be satisfactory to first party and necessary to the proper handling and care of such goods as are shipped to said second party under this contract.

(10) It is further understood and agreed by the parties hereto that the second party will not be entitled to nor receive any compensation covering shipments which may be made from time to time in carload lots to such trade as the first party may have at this time, or in the future acquire, within the territory referred to in the above. The said second party shall receive compensation only on such carload business as he secures directly through his own efforts, and on such carload shipments accepted by the first party for delivery to customers within the territory referred to, second party shall receive as his full compensation ——— per gallon.

(11) On deliveries made direct by the said second party within the territory as above described his compensation shall be as follows:

IN TOWN		OUT OF TOWN	
Gasoline	One ¢ per gal.	Gasoline	One ¢ per gal.
Kerosene	One ¢ “ “	Kerosene	One ¢ “ “
Distillate	One ¢ “ “	Distillate	One ¢ “ “
Lubricating Oils	Two ¢ “ “	Lubricating	Two ¢ “ “
Greases	½ ¢ per lb.	Grease	½ ¢ per lb.

PAYMENT OF COMMISSIONS.

(12) All commissions earned by the second party shall be paid by the first party not later than the tenth (10th) day of the month following:

(13) This agreement may be cancelled by either party upon fifteen (15) days notice in writing, otherwise to continue in full force and effect for one (1) year from date.

(14) In consideration of the above, the second party agrees to furnish said first party a satisfactory bond for the faithful performance of this

contract, and said bond is attached hereto and made a part hereof.

Accepted: C. W. YOUNG CO.,
By J. C. McBRIDE,
President.

Accepted: UNION OIL COMPANY OF
CALIFORNIA.

Witness:

E. A. NAUD.

Filed in the District Court, District of Alaska,
First Division. Oct. 9, 1920. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [6]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Third Amended Answer.

Comes now the defendant above named, and leave of Court being first had, files this, its third amended answer to the plaintiff's complaint, and admits, denies, and alleges as follows:

FIRST CAUSE OF ACTION.

I.

Defendants admit the allegations contained in paragraphs I and II of said first cause of action.

II.

Referring to the allegations contained in paragraph III of said first cause of action, defendant admits that plaintiff and defendant entered into the contract therein mentioned, but denies that plaintiff performed its obligations under the contract, and denied that plaintiff carried out the terms and conditions thereon as therein alleged.

III.

Referring to the allegations contained in paragraph IV of said first cause of action, defendant admits that plaintiff delivered to it goods, wares and merchandise, denies that the value of same was Five Thousand Six Hundred Nineteen Dollars and Thirty-four Cents (\$5,619.34); and admits that the same consisted of refined oils, [7] lubricating oils, greases and containers; admits that defendant paid to plaintiff the sum of One Thousand Five Hundred Ninety-nine Dollars and Twenty-two Cents (\$1599.22), denies that there was a balance of Three Thousand Seven Hundred Thirty-eight Dollars and Seventeen Cents (\$3,738.17) due the plaintiff from defendant, and denies that there was or is any sum whatever due the plaintiff from the defendant.

IV.

Referring to the allegations contained in paragraph V of the said first cause of action, defendant denies each and every allegation therein contained.

SECOND CAUSE OF ACTION.

I.

Referring to the allegations contained in paragraphs I and II of said second cause of action, defendant admits that on October 5th, 1918, plaintiff delivered to the defendant certain goods, wares and merchandise and denies that the same were worth Two Thousand Five Hundred Seventy-eight Dollars and Thirty-one Cents (\$2,578.31).

II.

Referring to the allegations contained in paragraph IV of said second cause of action, defendants admit that it has not paid plaintiff any portion of the sum of Two Thousand Five Hundred Seventy-eight Dollars and Thirty-one Cents (\$2,578.31), and denies that it owes plaintiff said sum, or any other sum whatsoever.

And for a further and affirmative defense, and by way of cross-complaint and counterclaim, defendant alleges:

FIRST AFFIRMATIVE DEFENSE.

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and authorized to [8] do business, and doing business at all times mentioned herein in the Territory of Alaska, and has paid its annual corporation license tax as required by law.

II.

That on or about the 14th day of February, 1917, the plaintiff and defendant entered into the con-

tract mentioned in the complaint herein, and attached to said complaint and marked Exhibit "A" and reference is hereby made to said contract and Exhibit "A" for the purposes of this answer.

III.

That under the terms of said contract set forth in Exhibit "A" above mentioned the defendant agreed to furnish storage facilities necessary for the proper handling of the oils and merchandise mentioned in said contract and which said storage facilities should be satisfactory to the plaintiff and the plaintiff under the terms of said contract agreed to supply the defendant with gasoline, kerosene, distillate, lubricating oils and lubricating greases sufficient to supply the ordinary requirements of the Territory described in paragraph 2 and 4 of said contract as Juneau, Alaska, and to keep the defendant supplied at all times during the term mentioned in said contract with sufficient oils and greases, etc., as above mentioned to supply the requirements of said territory.

IV.

That defendant fully performed its part of said contract and that pursuant to the terms of said contract and to the agreement between plaintiff and defendant therein, defendant furnished the necessary facilities for handling said oils and greases herein mentioned as set forth in paragraph 9 of said contract and which were satisfactory to the plaintiff; and that said facilities were procured and supplied [9] at a cost to the defendant of \$15,425.91 and that defendant maintained the same during the life of said contract and agreement at

an expense of \$3,969.48, making a total cost of the said storage facilities and their maintenance of \$19,395.39.

V.

That by virtue of said contract between plaintiff and defendant the plaintiff promised to pay defendant certain commissions upon the sale of said gasoline, kerosene, distillate, lubricating oils and lubricating greases, etc., as set forth in said contract and the same was to be paid as a consideration for defendant's furnishing said storage facilities above mentioned and handling and selling said commodities mentioned in said contract and that under the terms of said contract plaintiff undertook and agreed to furnish defendant with sufficient gasoline, kerosene, distillate, lubricating oils and lubricating greases to supply the ordinary requirements of the territory referred to in said contract as Juneau, Alaska.

VI.

That defendant, pursuant to the terms of said contract, procured sufficient orders in the ordinary course of business in the territory referred to in said contract and in the ordinary course of business in said territory and for the ordinary requirements of said territory to net it a commission upon said sales, under the terms of said contract, sufficient to reimburse the said defendant for all sums expended by it, in the furnishing and maintenance of the facilities for the sale of the said commodities; and in the course of said business and for the ordinary requirements of said territory referred to in said contract defendant procured

orders for the sale of said oils and greases mentioned in said contract to net it commissions, during the life of said contract and before the same was cancelled, of \$13,500.95. [10]

VII.

That in violation of the terms of said contract and contrary to plaintiff's agreement therein plaintiff failed to supply defendant with sufficient gasoline, kerosene, distillate, lubricating oils and lubricating greases as mentioned in said contract to supply the ordinary requirements of the territory referred to in said contract and failed to supply defendant with any of said oils and greases sufficient to net defendant any commission save and except the sum of \$3,819.09.

VIII.

That by reason of plaintiff's failure to perform its part of said contract in that it failed to supply said oils and greases to the defendant as above mentioned and as set forth in said contract, the defendant has been damaged in the sum of \$9,681.86.

IX.

That plaintiff has failed and refused to pay defendant said sum of \$9,681.86 or any part thereof and that the said sum is now due and owing from the plaintiff.

SECOND AFFIRMATIVE DEFENSE.

And for a further and second affirmative defense and by way of cross-complaint and counterclaim to plaintiff's complaint, defendant alleges, as follows:

I.

That defendant is a corporation organized under

the laws of Alaska and has paid its license taxes due the said Territory; and is and was at all times mentioned herein authorized to do, and doing business in said territory. [11]

II.

That in January, 1915, plaintiff and defendant entered into an oral contract by the terms of which defendant was to act as agent of the plaintiff for the sale of gasoline, distillate, coal oil, kerosene, lubricating oils and lubricating greases in the Territory of Alaska; and by the terms of said contract defendant agreed to furnish a dock and warehouse and storage facilities for the landing, storage and handling of said oils and greases and plaintiff agreed to furnish sufficient storage tanks for the storage of same at Juneau and to supply defendant at all times during the life of said contract with sufficient oils and greases, etc., above mentioned to satisfy and supply all the demands of all customers defendant could procure within the Territory of Alaska; and under the terms of said contract the same was to remain in full force and effect for 3 years or until cancelled by mutual consent or by either party's giving the other party 30 days' notice in writing of its intention to cancel the same. That said oral contract was made by and between J. C. McBride acting on behalf of defendant and George D. Clagett, District Sales Manager of the plaintiff and V. H. Kelly, district manager of plaintiff, and said contract was ratified by the acts of the plaintiff and by plaintiff's partial compliance with the terms of same.

III.

That under the terms of said contract plaintiff promised to pay defendant commissions of one cent (1¢) per gallon on all sales of gasoline, distillate, kerosene, etc., and two cents (2¢) per gallon on all sales of lubricating oils and one-half cent ($\frac{1}{2}$ ¢) per pound on all sales of lubricating greases made by defendant.

IV.

That pursuant to the terms of said contract defendant furnished said dock and warehouse and storage facilities at a cost of \$15,425.91, [12] and plaintiff for a time furnished defendant with said oils and greases above mentioned to be sold as provided in said contract.

V.

That defendant at all times performed its part of said contract and while the same was in force and during the years 1915 and 1916 procured orders for the sale of oils and greases above mentioned within the Territory agreed upon in said contract and pursuant to the terms of said contract, which would have netted defendant commissions in the sum of \$9681.86; and that plaintiff failed and refused to supply defendant with said oils and greases to fill its said orders or to net defendant any portion of said commissions above mentioned.

VI.

That by reason of plaintiff's failure to supply defendant with said oils and greases to fill its said orders and by reason of plaintiff's failure to perform its part of said contract in that it failed to supply said oils to the defendant the defendant

has been damaged in the sum of \$9681.86, no part of which has been paid by plaintiff.

VII.

That at the time the contract of February 14, 1917, mentioned in plaintiff's complaint, was entered into between plaintiff and defendant, the plaintiff acting through its agents, said Kelly and said Clagett and C. W. Ralph, manager of stations, promised defendant that it would adjust the differences between them which had arisen by reason of plaintiff's violation of the contract of 1915, and promised to pay defendant the amount due it under said contract.

VIII.

That although requested so to do plaintiff has failed and refused to pay defendant the said sum of \$9681.86 or any portion thereof [13] to defendant's damage in said sum.

WHEREFORE, defendant prays that plaintiff's complaint herein be dismissed and that it have and recover judgment against plaintiff in the sum of \$9681.86, together with its costs and disbursements herein.

H. L. FAULKNER,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

I, Walter De Long, being first duly sworn, depose and say: That I am agent and manager of the defendant, C. W. Young Company, a corporation, that I have read the foregoing answer and

know its contents and that the facts stated therein are true and correct as I verily believe.

WALTER DE LONG.

Subscribed and sworn to before me this 13th day of May, 1922.

H. L. FAULKNER,
Notary Public for Alaska.

My commission expires Nov. 14, 1922.

Service admitted May 13, 1922.

JNO. R. WINN,
Atty. for Plaintiff.

Filed in the District Court, District of Alaska, First Division. May 13, 1922. John H. Dunn, Clerk. By L. E. Spray, Deputy. [14]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Reply.

Comes now the above-named plaintiff, and replying to the third amended answer herein, admits, alleges and states as follows, to wit:

I.

Referring to the first affirmative defence in the

third amended answer of the defendant, this plaintiff admits Paragraphs I and II of said affirmative defence.

II.

Referring to paragraph III of the first affirmative defence in the third amended answer of the defendant, this plaintiff denies that under such contract referred to therein, it agreed to supply defendant with gasoline, kerosene, distillate, lubricating oils and lubricating greases sufficient to supply the ordinary requirements of the Territory described in Paragraphs II and IV of said contract, and to keep the defendant supplied at all times through the times mentioned in said contract with sufficient oils and greases, etc, to supply the requirements of said Territory.

III.

Referring to Paragraph IV of the first affirmative defence in the third amended answer of the defendant, this plaintiff denies that the defendant fully or otherwise performed its part of the [15] contract referred to in said paragraph; that this plaintiff has no knowledge or information sufficient to form a belief as to whether or not the facilities referred to in said paragraph cost the sum of \$15,425.91 or any other amount whatsoever; that plaintiff has no knowledge or information sufficient to form a belief as to whether or not the defendant maintained such facilities during the life of said contract and agreement referred to in said paragraph at the expense of \$3,969.48 or any other amount whatsoever; also this plaintiff has no

knowledge or information sufficient to form a belief as to whether or not the total of said last two mentioned items amounted to the sum of \$19,395.39 or any other amount whatsoever, and therefore denies each and all of said allegations.

IV.

Referring to Paragraph V of the first affirmative defence in the third amended answer of the defendant, this plaintiff denies that the commission mentioned therein was to be paid as a consideration for the defendant furnishing the storage facilities mentioned in said paragraph or any storage facilities whatsoever; also this plaintiff denies that said commission was to be paid otherwise than in said contract provided, a copy of which is attached to and made a part of the complaint herein; also this plaintiff denies that any other agreement or arrangement was had between plaintiff and defendant except as enumerated and set forth in the complaint herein and the agreement thereto attached.

V.

Referring to Paragraph VI of the first affirmative defence in the third amended answer of the defendant, this plaintiff denies the same and each and every portion thereof and denies that the defendant procured orders for the sale of oils and greases mentioned in the contract attached to the complaint, or otherwise, to net the defendant during [16] the life of said contract or otherwise or before the same was cancelled, in the sum of \$13,500.95 or any other amount or amounts whatsoever.

VI.

Referring to Paragraph VII of the first affirmative defence in the third amended answer of the defendant, this plaintiff denies the same and each and every portion thereof and as to that portion of said paragraph wherein the defendant states that the plaintiff failed to supply the defendant with any oils or greases to net the defendant commission in the sum of \$3,819.09; this plaintiff has no knowledge or information sufficient to form a belief as to said allegation or as to what amount defendant realized as commission and therefore denies said allegation.

VII.

Referring to paragraph VIII of the first affirmative defence in the third amended answer of the defendant, this plaintiff denies the same and each and every portion thereof and denies that the defendant has been damaged in the sum of \$9,681.86 or any other amount or amounts whatsoever.

VIII.

Referring to Paragraph IX of the first affirmative defence in the third amended answer of the defendant, this plaintiff admits that it has failed and refuses to pay to the said defendant the sum of \$9,681.86 and denies that there is due from plaintiff to defendant the said sum of \$9,681.86 or any other amount or amounts whatsoever.

Referring to the second affirmative defence in the third amended answer of the defendant, this plaintiff admits, alleges and denies as follows, to wit:

I.

Plaintiff admits Paragraph I of second affirmative defence in the third amended answer of the defendant.

II.

Referring to Paragraph II of second affirmative defence in third amended answer of the defendant, this plaintiff denies the same and each and every allegation therein contained and denies that the said George D. Clagett mentioned in said paragraph as district sales manager of the plaintiff and V. H. Kelly mentioned in said paragraph as district manager of plaintiff, or either or both of them, had any authority or was authorized in any manner whatsoever to enter into the contract mentioned in said paragraph, or any other contract whatever and denies that any such contract or any other contract claimed to have been entered into by and between said last mentioned parties was ever ratified in any manner whatsoever by the plaintiff.

III.

Referring to Paragraph III of the second affirmative defence in the third amended answer of the defendant, this plaintiff denies the same and each and every portion thereof, except that the plaintiff agreed to pay defendant in the manner set up in the Complaint herein and not otherwise.

IV.

Referring to Paragraph IV of the second affirmative defence in the third amended answer of the defendant, this plaintiff admits that defendant was at all times to furnish dock and warehouse and

storage facilities for the handling of any products of said plaintiff but plaintiff has no knowledge or information to form a belief as to whether or not the same were furnished at a cost [18] of \$15,425.91 or any other amount whatsoever.

V.

Referring to Paragraph V of the second affirmative defence in the third amended answer of the defendant, the plaintiff denies the same and each and every portion thereof and denies that defendant was damaged in the sum of \$9,681.86 or any other amount or amounts whatsoever.

VI.

Referring to Paragraph VI of the second affirmative defence in the third amended answer of the defendant, this plaintiff denies the same and each and every portion thereof and denies that defendant was damaged in the sum of \$9,681.86 or any other amount or amounts whatsoever, but admits that plaintiff has not paid defendant said sum or any portion thereof.

VII.

Referring to Paragraph VII of the second affirmative defence in the third amended answer of the defendant, this plaintiff denies the same and each and every portion thereof and denies that the said Kelly referred to therein or the said Clagett or the said C. W. Ralph, or either or all of them, was authorized in any manner whatsoever by said plaintiff to act on its behalf in regard to any matters alleged in said paragraph VII or to adjust any differences between plaintiff and defendant,

or that there were any differences of any name, nature or kind at that time or at any time by reason of the facts mentioned in said Paragraph VII existed between plaintiff and defendant, or that any promise was made to pay defendant the amount mentioned in said paragraph or any other amount or amounts whatsoever. [19]

VIII.

Referring to Paragraph VIII of the second affirmative defence in the third amended answer of the defendant, this plaintiff admits that it has not paid to the defendant the said sum stated in said paragraph of \$9,681.86 or any other amount or amounts whatsoever by reason of the facts set forth in said last-mentioned paragraph, or that defendant has been damaged in said amount or any other amount or amounts whatsoever.

And for an affirmative defence to the matters and facts set forth in defendant's third amended answer, this plaintiff admits:

I.

That the said plaintiff and defendant were at all times mentioned in the pleadings herein, both corporations, duly organized and existing and in all respects qualified to do business in the District and Territory of Alaska.

II.

That any and all contracts which were ever entered into by and between plaintiff and defendant herein by and under the terms of which the said plaintiff was to furnish the said defendant any products of oils or greases was, by mutual agree-

ment cancelled, set aside and held for naught long prior to the time of the commencement of this action and the account existing between plaintiff and defendant by reason of any contractual relations existing between plaintiff and defendant and by reason of plaintiff furnishing defendant any oils or greases, was fully gone over and checked up and the amount due and owing from defendant to plaintiff was, with full knowledge of plaintiff and defendant agreed upon and adjusted and the amount agreed upon due from defendant to plaintiff was as is set forth in the prayer of the complaint of the plaintiff herein. [20]

WHEREFORE plaintiff prays for judgment against the defendant for the sum specified and set forth in the complaint herein.

JNO. R. WINN,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

I, John R. Winn, being first duly sworn on oath, deposes and says: That I am attorney for the plaintiff herein, have read over the foregoing reply, know the contents thereof and believe the same to be true.

The reason that this verification is made by affiant is that there is no officer, agent or representative of the plaintiff in the Territory of Alaska who is authorized or qualified to make this verification.

JNO. R. WINN.

Subscribed and sworn to before me this 6 day of September, 1922.

[Notary Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Jan. 12, 1926.

I, John R. Winn, attorney for above-named plaintiff, hereby certify that the foregoing reply is a full, true and correct copy of the original reply in said case.

_____,
Attorney for Plaintiff.

The above copy of the reply received this 6th day of September, 1922, same being certified to by John R. Winn, Attorney for Plaintiff as being a full, true and correct copy of the original reply—service admitted.

_____,
Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Sept. 6, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [21]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury duly empanelled and sworn to try the above-entitled case, find for the plaintiff and assess its recovery and damages in the sum of \$3,-501.67—with interest from Sept. 10, 1918, and \$2,-578.31 with interest from Nov. 10, 1918, together with costs.

E. M. POLLEY,
Foreman.

Filed in the District Court, District of Alaska, First Division. Jan. 25, 1923. John H. Dunn, Clerk. By —————, Deputy.

Entered Court Journal No. 8, page 51. [22]

In the District Court for Alaska, Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendants.

Judgment and Decree.

This case having been duly and regularly set for hearing on the 18th day of January, 1923, at the hour of 10 o'clock in the forenoon of said day and both

parties appearing, at said time and plaintiff herein, Union Oil Company of California, appearing by its attorneys Winn & Ooghe and L. C. Kelly, and the defendant C. W. Young Company, a corporation, appearing by its attorney H. L. Faulkner, and all answering ready for trial, the Court proceeded to empanel the Jury for the trial of said case; that said jury was duly empaneled and sworn to try said cause according to law and rules and practice of this Court and after introducing all the testimony and evidence on the part of plaintiff and all the testimony and evidence on the part of defendant, and each side having rested, and after argument of counsel to said jury and instruction of the Court given to the jury, the jury retired to consider their verdict herein in charge of sworn bailiffs as by law required and after due deliberation of said jury, the said jury returned in open court, and the parties being represented by their respective attorneys and after the roll-call of said jury, the said jury returned and delivered in open Court to said Clerk and Court thereof, the following verdict, to wit:

“We, the jury, duly empaneled and sworn to try the above-entitled [23] case find for the plaintiff and assess its recovery and damages in the sum of \$3501.67 with interest from Sept. 10, 1918, and \$2578.31 with interest from November 10, 1918, together with costs.

(Signed) E. M. POLLEY,
Foreman.”

which said respective amounts so found due from defendant to plaintiff with interest according to said verdict amounts to date to the sum of \$8173.57; that a motion for a new trial having been duly and regularly served and filed herein and argument made thereon and submitted to the Court and overruled and denied by an order duly made and entered herein; and it further appearing to the Court that an attachment was issued out of this Court in this cause and the U. S. Marshal for the First Judicial Division, Alaska, under said writ of attachment duly levied upon and took into his possession the following described property belonging to and owned by the defendant, to wit:

“1 White Auto Truck.

237 Kegs of Nails.

1 lot of Belting.

1 Hearse.

26 Caskets.

1 thirty-foot boat complete with 4 h. p. American engine, now lying in the warehouse of C. W. Young Co.”

and the Court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff herein, Union Oil Company of California, a corporation, have and recover of and from the said defendant C. W. Young Company, a corporation, the sum of (\$8173.57) Eight Thousand One Hundred Seventy-three and 57/100 dollars, together with costs and disbursements to be taxed herein by the Clerk of the above court; and that the whole of said attached property of defendant above

stated be duly and regularly and according to law sold by the U. S. Marshal aforesaid or so much thereof as is necessary or sufficient to satisfy the full amount of this judgment, interest and costs as aforesaid; and that the remaining property, if [24] any, after satisfying said judgment, costs and interest aforesaid, be returned to the defendant herein; and let execution and special order of sale issue therefor and the Marshal make due and regular return thereon according to law.

It further appearing that the correct name and style of plaintiff corporation is "Union Oil Company of California," and that at different places in the proceedings in this case said plaintiff corporation has been incorrectly named and styled "Union Oil Company";

IT IS ORDERED that wherever said plaintiff corporation is named or styled in these proceedings as "Union Oil Company" that the same be changed or read as "Union Oil Company of California."

Done in open court this 1st day of February, 1923.

THOS. M. REED,
Judge.

O. K. as to form.

H. L. FAULKNER,
Atty. for Deft.

Entered Court Journal S, pages 75, 76. [25]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Motion for a New Trial.

Comes now the defendant, C. W. Young Company, and moves the Court to set aside the verdict of the jury, found and filed herein on January 25, 1923, upon the following grounds, to wit:

I.

The Court erred in giving Instruction No. VIII to the jury, which said instruction is as follows:

“I further instruct you, however, that under the contract it is pleaded, the plaintiff was not required to keep on hand, at Juneau, Alaska, at all times, a sufficient supply of oils to meet all possible demands. The defendant, under the contract, was appointed the agent of the plaintiff for the sale of its oils and by-products, and the presumption is, under the general terms of the contract plead, that the defendant would notify the plaintiff of all orders or contracts for the sale of oil received by it and that deliveries would be made by plaintiff according to such notification.”

II.

The Court erred in giving Instruction No. IX to the jury, which said instruction is as follows:

“In considering the contract of 1915, you should take into consideration the testimony of the witnesses and the letter of the plaintiff Oil Company to the defendant, of the date of March 1, 1915, which is Defendant’s Exhibit ‘A’; and from the evidence and such letter, determine the exact nature of the contract entered into between the parties, bearing in mind, however, that if the contract says that the defendant was acting as agent of plaintiff for the sale of plaintiff’s oil, it was its duty, as such agent, to notify the plaintiff of all sales and prospective sales of oils for delivery to customers; and further, unless the contract specifically provided, in terms that the oils and compounds mentioned in the contract, should at all times be kept on hand at Juneau, Alaska, for such sales as defendant might make, the defendant [26] could not complain by reason of shortage in the amount of such oils at Juneau, except as to such oils as were not delivered to defendant after request or notification to plaintiff by defendant of such sales.”

III.

The Court erred in giving Instruction No. XIII to the jury, which said instruction is as follows:

“I instruct you that the defendant is seeking, in this cause of action, to recover damages for the loss of anticipated profits on sales of oils

made by it, and in considering such anticipated profits you should consider only such contracts or agreements as are reasonably certain of execution, and should not indulge in estimates of profits or speculations or conjectures of witnesses not based upon facts. The purpose of allowing damages in cases of this kind, is to compensate the party injured by the breach of contract, for any loss he may have sustained thereby, and such damages must be capable of being estimated with reasonable certainty. Therefore, in this instance, which is for damages for loss of anticipated profits, you should take into consideration only those contracts for sale of oils made by defendant which are certain and specific as to amount and as to the time of delivery, and which, under the proof, you are reasonably certain would have been consummated had the goods been delivered to defendant by plaintiff, as provided by the contract, but failed because of non-delivery as required thereby. Mere expectations, doubtful offers or vague or indefinite assurances of intention to purchase, without the expression of quantity or value, and opinions as to what sales could or probably would have been made but for the alleged breach of the contract by plaintiff all fall within the category of speculative, uncertain and remote profits and do not, of themselves, show a right of recovery, and defendant cannot recover therefor. You, therefore, should consider only such contracts as you

are satisfied from the evidence, are reasonably certain as to the amount and date of the consummation thereof. Mere indefinite promises are matters of speculation and cannot be made the basis of a claim for damages.”

IV.

The Court erred in giving plaintiff's requested Instruction No. IV, contained on page 5 of the instructions submitted by plaintiff, which said instruction is as follows:

“Should you fail to find in favor of the plaintiff, according to the last instruction above given you, then it would become your duty to consider the question of the counterclaims or offsets set up in the third amended answer by the defendant, and I instruct you in respect thereto that anticipated profits, to be considered as an item of damage, must be shown with some degree of certainty, and the jury must be able to estimate their amount without resorting to speculation or conjecture. Mere estimates, speculations or conjectures of witnesses, not founded upon actual facts, or testimony that the plaintiff thinks or calculates that he would have been able to sell a certain amount, are insufficient.” [27]

V.

The Court erred in giving plaintiff's requested Instruction No. XII, contained on page 13 of the instructions submitted by the plaintiff, which said instruction is as follows:

“It is admitted in the pleadings that the contract made and entered into in the year 1917 provides that same may be canceled by either party upon fifteen days’ notice. You are therefore instructed that the defendant was not warranted in entering into any contracts or accepting orders for the sale of either refined or lubricating oils, the deliveries of which extended over a period of more than fifteen days, and the defendant cannot recover any damages for loss or profits by reason of same.”

VI.

The Court erred in giving plaintiff’s requested Instruction No. XIII, contained on page 13 of the instructions submitted by the plaintiff, which said instruction is as follows:

“The jury is instructed that under the terms and conditions of the contract of 1915, the defendant was not warranted in entering into any contracts or orders for the sale of either refined or lubricating oils, the delivery of which was to be made in the future, and defendant cannot recover any sum as damages for loss of profits on such contracts or orders, unless such contracts or orders were confirmed by the plaintiff after notice thereof by defendant.”

VII.

The Court erred in rejecting the evidence offered by defendant to prove the cost and expense of furnishing and maintaining the necessary dock, warehouse, and storage facilities for the sale of refined

and lubricating oils, greases, etc., under the contract of 1915.

VIII.

The Court erred in rejecting the evidence of defendant as to the general business conditions of the trade in the Territory of Alaska and the vicinity during the years covered by the contracts mentioned in the pleadings.

In presenting the foregoing motion, the defendant will rely upon the records and files in the above entitled cause.

Respectfully submitted, [28]

H. L. FAULKNER,
Attorney for Defendant.

Copy rec'd this 27th day of Jan. 1923.

JNO. R. WINN,
One of the Attys. for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Jan. 27, 1923. John H. Dunn, Clerk. By W. B. King, Deputy. [29]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2013—A

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Order Overruling Motion for New Trial and Granting Stay of Execution.

This matter having come on regularly for hearing on January 29, 1923, upon the motion of the defendant, C. W. Young Company, a corporation, for a new trial herein, and the matter having been argued in open Court by counsel for plaintiff and defendant, and the Court being fully advised in the premises;

It is hereby **ORDERED** that said motion be and the same is hereby overruled, and the defendant is allowed an exception to said ruling.

And upon stipulation of counsel it is hereby further **ORDERED** that the defendant have ninety days within which to prepare and settle the bill of exceptions upon appeal herein, and it appearing that the plaintiff has attached certain property of the defendant in this action, and that defendant has given plaintiff a redelivery bond with good and sufficient sureties in the sum of \$8,500.00, which said bond remains in full force and effect,

It is further **ORDERED** that a stay of execution be and the same is hereby granted to defendant for a period of thirty days from the date hereof without any additional bond, providing said redelivery bond is kept in force and effect during said period, and providing that at the expiration of said period, or prior thereto, defendant will furnish [30] the proper bond for stay of execution and appeal to be approved by the Clerk of this Court.

Done in open court this 30th day of January, 1923.

THOS. M. REED,
Judge.

O. K.—JNO. R. WINN,
Of Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Jan. 30, 1923. John H. Dunn, Clerk. By _____, Deputy.

Entered Court Journal No. S, page 66. [31]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be tried at Juneau, Alaska, on Thursday, the 18th day of January, 1923, before the Honorable Thos. M. Reed, Judge of said Court, and a jury.

The plaintiff was represented by its attorneys and counsel, Messrs. Winn & Ooghe and L. C. Kel-

ley; and defendant was represented by its attorney and counsel, H. L. Faulkner, Esquire.

A jury having been impaneled, opening statements were made to the Court and jury by Judge Winn on behalf of the plaintiff and by Mr. Faulkner on behalf of the defendant.

Whereupon the following proceedings were had and done, to wit: [33]

Testimony of Wilfred C. Trew, for Plaintiff.

WILFRED C. TREW, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Just give the reporter your first name, Mr. Trew, will you?

A. Wilfred C. Trew.

Q. Where do you live, Mr. Trew? A. Seattle.

Q. Are you now, or have you been in the past in anywise connected with the business of the Union Oil Company, the plaintiff in this case?

A. Yes, I have been, since 1906.

Q. What has been your business, or what has been your position with that company covering the period from 1906 up to the present time?

A. Since 1914, credit manager at Seattle.

Q. Credit man. Will you just explain to the jury what you mean by "credit man"?

A. Have charge of the credits for Washington,

(Testimony of Wilfred C. Trew.)

British Columbia and did have charge of the credits in Seattle, or in Alaska.

Q. Your company did some business up here for a while, in what year?

A. We started selling to the C. W. Young Company about the latter part of 1911, I think.

Q. That is, you started in shipping some oil to Alaska some time in 1911? A. 1911.

Q. And when did you quit? [34]

A. August, 1918.

Q. Now, from 1914, did you say, up to the present time, you have been what is called a credit man of the Union Oil Company? A. Credit manager.

Q. Credit manager. I meant "manager"—of the Union Oil Company stationed in Seattle. And your duties extend over what territory?

A. Washington, British Columbia and Alaska.

Q. Do you know Mr. J. C. McBride?

A. Yes, sir.

Q. When did you first become acquainted with him?

A. About December, 1914, or January, 1915.

Q. Now, I will ask you, Mr. Trew, if you came to Juneau any time during the year 1918.

A. Yes; the latter part of August.

Q. Mr. McBride was occupying what position, if any, with the C. W. Young Company?

A. He was president of the C. W. Young Company.

Q. Did you have any conversations with Mr. McBride, concerning any dealings that the Union Oil

(Testimony of Wilfred C. Trew.)

Company had had with the C. W. Young Company prior to August, 1918, when you were up here?

A. Yes; we discussed the matter generally.

Q. Was there at that time any outstanding account between the Union Oil Company and the defendant, the C. W. Young Co., in this case?

A. Yes; there was an amount extending back into 1917 and all the deliveries for 1918 were unpaid for.

Q. 1917 and 1918. That was the period of time that you conversed with Mr. McBride about representing the C. W. [35] Young Company, concerning the products of the company for the two years that you have just last mentioned? A. Yes.

Q. Now, then, you say that there was an outstanding account between the C. W. Young Company and the Union Oil Company at that time?

A. Yes.

Q. Did you and Mr. McBride, Mr. McBride representing the defendant company in this case, have any conversation about this outstanding account or any amount that was due from the defendant, the C. W. Young Company, which indebtedness had accrued prior to August, 1918?

A. Yes; we checked over the account, but the figures didn't agree.

Q. Well, even if your figures didn't agree, when you and Mr. McBride checked over your account, it was found that the Union Oil Company was on the debit or credit side of the account, so far as the C. W. Young Company and the Union Oil Company were concerned?

(Testimony of Wilfred C. Trew.)

A. The amount that we claimed owing on our books differed with the amount owing—with the amount the C. W. Young Company were showing at that time by possibly three hundred dollars.

Q. Now did you and Mr. McBride, you representing the Union Oil Company and Mr. McBride the C. W. Young Company, go over these respective figures that you have just mentioned?

A. Yes; Mr. Earl Naud, Mr. McBride and myself attempted to check the account, but there had been so many mistakes made in the extensions of the tickets that they had sent [36] to us that we had corrected when they got to Seattle, that it was almost a hopeless task to make our books agree with theirs, and we accepted, mutually agreed at that time, to accept the figures that the C. W. Young Company's books showed.

Q. That is, for the products that you had shipped to the C. W. Young Company prior to August, 1918?

A. Yes.

Q. And covering what period of time—what year?

A. The greater part of the year 1917 and all of 1918.

Q. Those two years? A. Yes, sir.

Q. Now, then, did you and Mr. McBride and Mr. Naud go over the books of the C. W. Young Company to ascertain as to the condition of the account as shown by their books, as between the plaintiff and defendant in this case? A. Yes.

(Testimony of Wilfred C. Trew.)

Q. Did they furnish you, at that time, with any statement of what their books showed?

A. Yes; they did.

Q. I'll hand you these papers, which consist of several pages, and ask you to look at them and see if that is the statement that was furnished you by Mr. McBride at that time and shows that he claimed was the condition of the account existing between the C. W. Young Company and the plaintiff at that time?

A. Yes (examining papers); this was the statement made out at that time by the C. W. Young Company and covered the period from January 1, 1918— [37]

The COURT.—(Interrupting.) He didn't ask you what it covered; he simply asked you what it was. You wish to see the statement?

Mr. FAULKNER.—Yes; before it is introduced.

Judge WINN.—I'm just identifying it; that's all.

The COURT.—Now you may question him further.

Q. Where was this account that I have just handed to you delivered to you, Mr. Trew, and by whom?

A. In the office of the C. W. Young Company.

Q. And who was in there?

A. Mr. McBride and Earl Naud.

Q. Now, there are several places here and in order to explain them—they're made out in terms that might need some explanation further. Well, I'll withdraw the question.

(Testimony of Wilfred C. Trew.)

Judge WINN.—If your Honor please, we now offer this statement in evidence.

Mr. FAULKNER.—I would just like to ask the witness a question.

The COURT.—You may.

(Questions by Mr. FAULKNER.)

Q. Mr. Trew, this statement simply contains some figures? A. Yes, sir.

Q. And nothing else on it? A. No.

Q. Who gave you that statement?

A. Mr. Earl Naud.

Q. And that was made up by him? A. Yes.

Q. And that simply contains a statement of the oil that [38] was not paid for?

Mr. KELLEY.—Well, that's cross-examination.

Mr. FAULKNER.—I want to find out what the statement contains.

The WITNESS.—Well, I was just going to answer the question and state what it contained to Judge Winn.

Q. That was given you by Mr. Naud?

A. Yes, sir.

Mr. FAULKNER.—I don't think we have any objection.

Q. (Examination resumed by Judge WINN.) Well, was Mr. McBride there? A. Yes, sir.

Q. And did Mr. McBride go over it?

A. Mr. McBride didn't check the statement himself.

Q. Did he say anything about it?

A. He asked Earl if it was correct.

(Testimony of Wilfred C. Trew.)

Q. What was the answer?

A. He said it was and agreed with their books. This is a statement—

The COURT.—(Interrupting.) Now, wait a moment.

Judge WINN.—Now, then, we offer the statement in evidence.

The COURT.—The statement may be received and filed and marked as plaintiff's exhibit.

(Whereupon said statement, consisting of 22 sheets and dated August 24, 1918, was received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. Now, as I stated before—I started to state and then withdrew the question—this statement consists of several pages. I will ask you if you have any explanation to make as to the entries that are made thereon and what [39] certain ciphers, or certain figures there indicate, and was so understood to indicate between you and Mr. McBride and Mr. Naud, when it was made out?

A. Every time they sold a bill of goods, they made out an order on one of our order blanks. The order blanks were numbered—number of the books and the different tickets in the book. This statement was made out for each separate month of the year 1918, the tickets listed—ticket numbers listed and the amounts listed, and at the end of each month the commissions that the C. W. Young Company were entitled to, were deducted from the total amount for each month there, recapitulated on the first sheet.

(Testimony of Wilfred C. Trew.)

Q. That is, you mean, the first sheet that's on this exhibit?

A. The first sheet is a recapitulation of each month.

Q. You put it on Plaintiff's Exhibit No. 1?

A. Yes.

Q. That is a recapitulation of what?

A. Of the several months of the year 1918, up to and including August.

The COURT.—That is the monthly sales, or just a recapitulation of the monthly sales?

The WITNESS.—Yes.

The COURT.—During 1918?

The WITNESS.—Yes, sir.

Q. Has it anything on there concerning the year of 1917?

A. Nothing on for the year 1917, because at that time I received payment for the account up to and including December 31, 1917. [40]

Q. From whom did you receive that?

A. From Mr. McBride.

Q. So the amounts prior to the first of January, 1918—

A. (Interrupting.) There was no occasion to make out a statement for the time previous to that, because we accepted their figures for that amount and gave them credit in full for the account, up to and including December 31, 1917.

Q. Now, about this statement which we have just offered in evidence, which is marked Plaintiff's Exhibit No. 1, which was made out from

(Testimony of Wilfred C. Trew.)

C. W. Young Company's books, and that your books and their books showed there was a slight difference in, did you accept their statement or did you stand upon the statement as your books showed as to what the condition of the account was at that time?

A. We accepted their figures. We spent some weeks in Seattle trying to reconcile their figures and made a small attempt to reconcile them here, but we couldn't do so, for the reason that the difference had been accumulating for months in the extension of the tickets.

Q. Did you accept this account, exhibit No. 1, as the condition of the affairs between the plaintiff and the defendant at the time it was delivered to you and up to that date?

A. Yes; and when I returned to Seattle we put through a credit, reducing our account to this amount.

Q. What is the total amount there as indicated?

A. \$3738.17. [41]

A. Thirty-seven, three— A. \$3738.17.

Q. You have read over the complaint and that is the amount that is in the first cause of action in this case? A. Yes, sir.

Q. Has that account ever been paid?

A. No; this has never been paid.

Q. Any portion of it? A. No.

Q. Is it due? A. Yes, sir; past due.

Q. When it became due, what understanding, if any, did you have with Mr. McBride, representing

(Testimony of Wilfred C. Trew.)

the C. W. Young Company as to when it would be paid?

Mr. FAULKNER.—I didn't get that question.

Judge WINN.—I asked him what conversation, if any, he had with Mr. McBride concerning when this balance that the account shows was to be paid.

A. I told Mr. McBride at that time that I had come to Juneau to get the account paid in full. Mr. McBride told me that he couldn't pay the account in full at that time, and after thinking the matter over, said he could pay approximately \$4,000. On checking over the account, I noticed that a payment of \$4,000 would pay the account approximately up to December 31, 1917—it required a couple of hundred dollars extra to make the payment—so Mr. McBride agreed, at that time, to make the check sufficient to include December 31, 1917.

Q. And that was done?

A. Yes; I got that check. [42]

Q. Now, what, if anything, has been done regarding this balance that is shown on exhibit No. 1? Was any time specified as to when it was due or when it was to be paid?

A. Mr. McBride said he would pay it as soon as he possibly could.

Q. Was it due at the time you were up here?

A. Oh, yes; it was all past due.

Q. In August, 1918, it was past due?

A. Yes, sir.

Q. Now, then, did you have any further conversation or dealings at that time with Mr. McBride,

(Testimony of Wilfred C. Trew.)

representing the C. W. Young Company, and yourself representing the Union Oil Company, concerning any stock of oils or greases, and so forth, that were on hand at Juneau at that time, which had been shipped by the Union Oil Company up to the C. W. Young Company?

A. Yes; we took a physical inventory of all the stock on hand at that time, both at the dock and at the C. W. Young Company's store.

Q. Well, you say you did. Did you and Mr. McBride further have any agreement or conversation concerning the amount of stuff that was then on hand which had been shipped up here to the C. W. Young Company by the Union Oil Company?

A. Yes; we talked of the sale of the stock on hand on account of the excessive rates and the cost of bringing it back to Seattle, and Mr. McBride said he would purchase the stock on hand if we would make him a reasonable price.

Q. That stuff was here in Juneau at the time?

A. It was here in their warehouse and on the dock. [43]

Q. What, in a general way—

The COURT.—(Interrupting.) Just wait a moment. I want to ask you a question. This is the stock that was left over after your settlement for the sales made by you of the oil which had been shipped under your contract, or agreement, as alleged in the complaint—

The WITNESS.—Any settlement that I might have had concerned goods that had already left the warehouse. They were sold.

(Testimony of Wilfred C. Trew.)

The COURT.—But this was the stuff that was left which you had shipped up to the C. W. Young Company under your written agreement?

The WITNESS.—Yes.

The COURT.—That's what I wanted to find out.

Q. And had, or had not this stuff that you found on hand at that time, that is, you and Mr. McBride, been paid for?

A. It hadn't been paid for. It was still the property of the Union Oil Company until sold.

Q. Well, now, did you and Mr. McBride, after going over what was on hand here at that time, unpaid for, have any understanding as to what disposition would be made of it?

A. I explained to Mr. McBride that it would cost a lot to move it back to Seattle and I asked him if he could sell it. He said that if we made him a favorable price he thought he could. I asked him if he could take all of it. He said yes; that some of the commodities might move slowly, but that if we made him a good price, he would take all of it, according to the inventory that we took at that time. [44]

Q. What did it amount to?

A. It amounted to twenty-five, eighty-seven thirteen. (2587.13), I think.

Q. Twenty-five what?

A. Twenty-five, seventy-eight, thirty-one (2578.-31).

Q. You have read over the complaint in this case?

A. Yes.

(Testimony of Wilfred C. Trew.)

Q. Now, that is what we have termed the second cause of action? A. Yes.

Q. The figure that is in the complaint there is the balance due, is the amount that you have just stated? A. Yes.

Q. Well, look it over.

A. (After examining pleadings.) Yes; that's the amount—\$2578.31.

Q. \$2578.31. Well, did you ship it back, or what became of these products or oils that were on hand?

A. In order to close out the stock at that time, the same as if we would make a sale to a customer, we used one of the order forms that they had been using, listed all the stock as per inventory, but didn't extend the ticket as I told Mr. McBride at that time that I would take it up with the sales manager and endeavor to get him a slightly better price on the commodities that wouldn't move quickly.

Q. Then, according to that statement, it amounted to a little over this amount on the second cause of action, \$2578.31.

A. Yes; it amounted to something like one hundred and thirty-five or thirty-seven dollars more than that. [45] I was giving him at that time the very best price that I was authorized to give—what we considered a jobber's price.

Q. Then, did you afterwards give him the benefit of that one hundred and thirty-six and some odd dollars?

A. Yes; after explaining the matter to the sales manager at Seattle. I told him that some of the

(Testimony of Wilfred C. Trew.)

commodities might not move for a long while and asked him if he could reduce the price and he did reduce it to the extent of approximately \$136.

Q. Was the C. W. Young Company advised of this?

A. Yes, we wrote them to that effect.

Q. That reduced the sale to \$2578.31, after you took off the 136 dollars and something.

A. Yes, sir.

Q. Who kept the oil? Was it reshipped to you or did the C. W. Young Company keep it?

A. No, it remained here in their warehouse.

Q. Has that amount ever been paid by the C. W. Young Company? A. No.

Q. Is it due—past due?

A. Yes; past due.

Q. How long has it been past due?

A. Since September 10, 1918.

Q. September 10, 1918. When did you invoice it, in September or October?

A. We invoiced it October fifth. Then, I want to correct [46] that statement. It was invoiced October 5, 1918, and would be due on the tenth of the following month; although the actual delivery of the goods took place in August, it was not invoiced until October fifth.

Q. Then it was actually due on what date?

A. November tenth.

Q. 1918. A. Yes.

Q. Has any part of that been paid? A. No.

Judge WINN.—That's all.

(Testimony of Wilfred C. Trew.)

Cross-examination.

(By Mr. FAULKNER.)

Q. What was this last item of \$2578.31.

A. Consisted of the oils on hand in Juneau.

Q. What is that?

A. Consisted of the oils on hand in Juneau at that time.

Q. In November, 1918? A. In August.

Q. Now, I didn't get quite clearly through my mind the distinction between these two items. Was the \$2578.31 all that was due in August, 1918, Mr. Trew? In other words, just explain the matter. The jury might understand it better than I do, but will you explain the difference between these two items—\$3738.17 and \$2578.31?

A. What are the two amounts you are giving me?

Q. Well, the two amounts that you claim in your complaint. Now, you say that you came up here and checked up the amount of oil on hand, amounting to \$3738.17, [47] according to the statement you have introduced in evidence as exhibit No. 1. Now, that you say consisted of oil sold to the C. W. Young Company, or consigned to them, in the year 1918? A. No, no.

Q. Well, that is one thing I didn't get clear.

A. Which one do you want?

Q. The one you have in your hand?

A. This is \$3738.17.

Q. Now, what does that consist of?

A. It consists of oil sold by the C. W. Young Company from January 1, 1918, up to August, 1918.

(Testimony of Wilfred C. Trew.)

Q. Now, what was the other item of \$2578.31 for?

A. For that oil on hand in their warehouse when I arrived here.

Q. Oh, yes.

A. The oil belonged to us at that time.

Q. But the first item was the oil that they had sold, that was gone when you arrived? A. Yes.

Q. And the other item was the oil which you checked up?

A. It was on hand in the warehouse.

Q. Now, Mr. Trew, you had nothing to do with the entering into of contracts for the sale of oils, did you? A. Now, or then?

Q. Then? A. I had nothing to do with it.

Q. Who was in charge of the Union Oil Company's business in Seattle in January, 1917?

A. Mr. Clagett. [48]

Mr. KELLEY.—To which we object as incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—I hardly think it is proper cross-examination.

Objection sustained.

Q. You had nothing to do with any of these contracts which you mentioned, for the sale of oil?

Judge WINN.—I object to that, because he hasn't testified to any contracts. He simply testified that he checked over these accounts and found that there was a certain amount due and that he accepted Mr. McBride's figures, and also that he delivered to him certain oils. I didn't ask him any-

(Testimony of Wilfred C. Trew.)

thing about any contract. That is a part of their defense.

Mr. FAULKNER.—That is true, but I don't see how it is going to do any harm.

The COURT.—He testified as to the delivery of the oil and the price of the oil agreed upon. This question is whether he had anything to do with the entering into of the contract. I think it is permissible.

Mr. KELLEY.—I don't believe that was the form of the question.

(Question repeated by reporter upon request of the Court.)

A. I don't remember any contracts.

Q. What is that?

A. I didn't mention any contracts.

Q. Now, Mr. Trew, I think you said something about certain oils that were on hand. Now the oils that were sold, representing \$3738.17, were shipped under the contract that was in effect in the year 1917? A. They were; yes. [49]

Q. Now you, yourself, had no part in entering into that contract? That wasn't a part of your duty at that time, was it? A. Yes, it was.

Q. What is that? A. Yes.

Q. And did you—

A. (Continuing.) I approved all contracts.

Q. You approved them all? A. Yes.

Q. You didn't execute the contract?

A. No; they're executed by the officials—written contracts.

(Testimony of Wilfred C. Trew.)

Q. But you are the man who negotiated this contract and in entering into it—

Judge WINN.—(Interrupting.) We object to it. Now, this particular contract of 1917—

Mr. FAULKNER.—All right. I withdraw the question.

Judge WINN.—(Continuing.) Is admitted.

Q. Mr. Trew, the amounts which you have given here, the one of \$3738.17 was the amount which was agreed upon by the C. W. Young Company as the oil they had sold during the year 1918; is that right?

A. No; it isn't the amount that we agreed on. Their books showed that amount and we agreed to accept that amount.

Q. Then you both agreed to it?

A. We both agreed.

Q. And the amount \$2578.31 was the amount that you agreed upon as the amount of oil on hand in August, 1918? [50] A. Yes.

Q. And that was all you had to do with this when you came up here at that time?

A. Why, I practically closed out the agency at that time.

Q. Yes; and you came up to check up those figures; check up the oil on hand?

A. I came up to make a settlement, check the oil on hand and close out the agency.

Mr. FAULKNER.—I think that's all.

Redirect Examination.

(By Judge WINN.)

Mr. FAULKNER.—Just one further question I

(Testimony of Wilfred C. Trew.)

want to ask. Mr. Trew, this contract, then, that was entered into in 1917, February, 1917, terminated when? You say you came here to close out the agency.

Mr. KELLEY.—To which we object, because it is admitted in the pleadings.

The COURT.—Objection sustained. The contract itself provides for its termination.

Mr. KELLEY.—Not only that, but it is admitted by the pleadings that it was ended by mutual consent in August, 1918.

Mr. FAULKNER.—According to Mr. Trew's statement, the contract was still in effect. According to his statement, it continued longer than that.

Mr. KELLEY.—Well, it's admitted in the pleadings.

The COURT.—Well, he may answer, if he knows.

Q. This contract of February, 1917, continued in effect [51] until what time in 1918?

A. We closed out the business about August 24, 1918.

Q. About August 24, 1918. A. Yes.

(Witness excused.)

Testimony of L. C. Kelley, for Plaintiff.

L. C. KELLEY, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Mr. Kelley, you reside in Los Angeles?

(Testimony of L. C. Kelley.)

A. I do.

Q. You are one of the attorneys for the Union Oil Company? A. I am.

Q. And one of the attorneys in this case?

A. I am.

Q. Do you know Mr. McBride? A. I do.

Q. When did you first meet Mr. McBride?

A. The first part of October, 1920.

Q. In October. The first of October, about 1920.

A. Yes; the first part of October.

Q. Where did you meet him?

A. Here in Juneau.

Q. What was your occasion for being in Juneau?

A. I was sent up here to see if some settlement of this matter could not be made.

Q. You met Mr. McBride and had a conference with him? A. Yes, sir.

Q. I'll hand you this exhibit, which is marked Plaintiff's [52] Exhibit No. 1 that has been introduced in evidence and ask you if you had that account with you at the time you came up here in October, 1920? A. I did.

Q. Did you go over that account or have any conversation about the account and the amount that was due on it, with Mr. McBride, who was representing the C. W. Young Company?

A. I had a conversation with Mr. McBride concerning this account. I can't say that I went over it with him personally, but I had a conversation with him concerning it.

Q. And you went over it personally with him?

(Testimony of L. C. Kelley.)

A. Well, that is, we went over it personally in this way, Judge: I had this Plaintiff's Exhibit No. 1 in my possession, and I told him that I wanted to check over the account and ascertain the amount that was actually due and whether or not these figures were correct, and he said, "No, there isn't any use of your doing that, Mr. Kelley. This account, prior to January 1, 1918, has all been settled with Mr. Trew and Mr. Trew has gone over all these figures—"

Q. (Interrupting.) What figures?

A. These figures in Plaintiff's Exhibit No. 1. And I said. "Well, are these figures correct?" and he handed the statement to Earl Naud and he said, "Earl, are these figures correct?" and Earl looked at this and he said, "I prepared that statement for Mr. Trew and the figures are correct." [53]

Q. Did Mr. McBride say anything in regard to that? A. No.

Q. Well, did they pay anything on it while you were up here? A. They did not; no.

Q. Mr. Naud, what capacity was he acting in, apparently, for the C. W. Young Company?

A. Really, I can't state. Well, I believe—it was my understanding, at least, that he was the head bookkeeper, although I'm not—I'm not positive concerning that.

Q. Anyway, Mr. McBride referred this account and these figures to Earl Naud? A. Yes.

Q. Now, the amount of this account is the amount that Mr. Trew has stated and is the amount set

(Testimony of L. C. Kelley.)

forth in the first cause of action in the complaint in this case. A. Yes.

Q. Did you have any further or other conversation with Mr. McBride concerning any other amount that was due the Union Oil Company from the C. W. Young Company?

A. Well, there was in addition to this, the amount set forth in the second cause of action of our complaint, which represented products which Mr. Trew had sold to the C. W. Young Company—he was here—and which had not been paid for when I came here.

Q. Did he pay anything on that? •

A. He did not.

Q. So you left town without collecting anything on either one of these amounts? A. Yes.

Q. The amount in the second cause of action for the oils [54] and so forth which was left with the C. W. Young Company and the amount that is in this account marked Plaintiff's Exhibit No. 1?

A. That is correct.

Judge WINN.—I think that is all. If your Honor please, at this time, the contract of 1917 is attached to the complaint and made a part of it—

The COURT.—(Interrupting.) It's admitted in the pleadings?

Judge WINN.—Admitted in the pleadings, and unless counsel would waive the reading of it, we offer to read it. I don't know whether it is necessary or not. Perhaps it is to get it in evidence.

The COURT.—Well, in order to make it an ex-

(Testimony of L. C. Kelley.)

hibit in the case, although it is attached to the complaint, you might make it an exhibit in the case, unless admitted by both parties that it was entered into. You might make a copy of it so that it can go before the jury.

Judge WINN.—Yes, but the pleadings cannot be evidence unless you offer them in evidence, and we offer it in evidence at this time.

The COURT.—It may be received in evidence.

Mr. FAULKNER.—We have no objection. We would just as soon have it read.

The COURT.—I think you better offer it in evidence and have it made an exhibit so that they can take it with them into the jury-room.

(Whereupon Mr. L. C. Kelley read said contract, as follows): [55]

“MEMORANDUM OF AGREEMENT.

“THIS AGREEMENT, made and entered into this 14th day of February, 1917, by the Union Oil Company of California, a corporation duly organized under the laws of the State of California, party of the first part, and (Name) C. W. Young Company of (Town) Juneau, (State) Alaska, party of the second part,

“WITNESSETH:

“1. The first party hereby appoints the second

party as its agent for the sale of its products, as follows: (Insert list of products to be sold.)

“Gasoline,

“Kerosene,

“Distillate,

“Lubricating oils,

“Lubricating greases.

“2. In the following described territory, Juneau, Alaska.

“3. It is mutually understood and agreed by the parties hereto that the second party’s authority so far as the first party is concerned is strictly limited to the terms and conditions set forth and made a part of this contract.

“DELIVERIES.

“4. The first party agrees to deliver the above-described products to the second party f. o. b. Juneau, Alaska, same to be in tank cars, iron barrels, drums, cases or packages, and for the ordinary requirements of the territory referred to in clause 2.

“SALES.

“5. It is understood and agreed by the parties hereto that all sales made by the second party shall be for cash on delivery, and in accordance with the written prices as furnished by the first party. No deliveries are to be made on credit to be carried by the party of the first part without written authority from the first party.

“REPORTS.

“6. The second party further agrees to render

such reports of the business transacted under this contract as may be required by the first party.

“EQUIPMENT.

“8. It is understood and agreed that the second party will make all retail deliveries and that all shipments made by the first party to said second party, are to be promptly and properly accounted for by said second party, and that any loss in excess of 2% which may occur by leakage or otherwise [56] after delivery by first party as herein specified, shall be paid for by the second party within ten (10) days after the close of each month's business.

“9. It is understood and agreed that the said second party shall furnish at his expense, such storage facilities as may be satisfactory to first party and necessary to the proper handling and care of such goods as are shipped to said second party under this contract.

“10. It is further understood and agreed by the parties hereto that the second party will not be entitled to nor receive any compensation covering shipments which may be made from time to time in carload lots to such trade as the first party may have at this time, or in the future acquire, within the territory referred to in the above. The said second party shall receive compensation only on such carload business as he secures directly through his own efforts, and on such carload shipments accepted by the first party for delivery to customers within the territory referred to, second party shall receive as his full compensation — per gallon.

“11. On deliveries made direct by the said second party within the territory as above described, his compensation shall be as follows:

“IN TOWN		“OUT OF TOWN	
Gasoline	1¢ per gal.	Gasoline	1¢ per gal.
kerosene	1¢ per gal.	kerosene	1¢ per gal.
distillate	1¢ per gal.	distillate	1¢ per gal.
lubricating oils	2¢ per gal.	lubricating	2¢ per gal.
greases	½¢ per lb.	grease	½¢ per lb.

“PAYMENT OF COMMISSIONS.

“12. All Commissions earned by the second party shall be paid by the first party not later than the tenth (10th) day of the month following:

“13. This agreement may be cancelled by either party upon fifteen (15) days’ notice in writing, otherwise to continue in full force and effect for one (1) year from date.

“14. In consideration of the above, the second party agrees to furnish said first party a satisfactory bond for the faithful performance of this contract, and said bond is attached hereto and made a part hereof.

“Accepted:

“C. W. YOUNG CO.,

“By J. C. McBRIDE,

“President.

“Accepted:

“UNION OIL COMPANY OF CALIFORNIA”

Witness:

E. A. NAUD. [57]

(Whereupon a recess was taken until 2 P. M.)

Friday, Jan. 19, 1923, 2 P. M.

Court met pursuant to recess.

After argument on amendment, by interlineation, of the answer, the plaintiff rested its case.

And thereupon the defendant, to maintain the issue on its part introduced the following evidence, to wit:

Testimony of J. C. McBride, for Defendant.

J. C. McBRIDE, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Judge WINN.—If your Honor please, before they offer any evidence in the case, there have been so many motions and demurrers filed in these proceedings that it is hard to single out and put them all together and say just what has been included in the demurrer.

The COURT.—I realize that very much.

Judge WINN.—I will give Mr. Faulkner a copy. The only question we raise on this demurrer, to be particular about it, is that I demur to each one of the paragraphs of each affirmative defense separately, which probably we have done before. Whether we did it to all or not, I don't know.

The COURT.—I don't think you can demur to each separate paragraph of the complaint or counterclaim separately. You have got to consider the whole pleadings together.

(Testimony of J. C. McBride.)

Judge WINN.—That is true, but what I have done to avoid that very thing, I have demurred to the whole of it in the same paper. [58]

The COURT.—Well, now, I'll hear you on your demurrer to the whole.

* * * * *

The COURT.—I think that's already been ruled on. I'll adhere to my former ruling at the present time. If you desire to raise any questions, you can raise them, as to the admission of evidence.

Judge WINN.—I think your Honor has probably passed on it.

The COURT.—Well, it will be overruled.

Judge WINN.—Allow us an exception.

The COURT.—You have an exception to the former ruling. No use of encumbering the record.

Q. (By Mr. FAULKNER.) Mr. McBride, will you state your name?

Judge WINN.—Now, if your Honor please, we object to any testimony or evidence being introduced in this case on behalf of the defendant for the reason, in so far as the allegations of the complaint are concerned, so far as the allegations of the complaint in this case are concerned, they are admitted by the answer of the defendant—

The COURT.—Now, wait a minute. The allegations of the complaint admit that the sum of—that you sold this property to the defendant, in the sum of so many dollars; one dollar less than the amount alleged in the complaint was the value of

(Testimony of J. C. McBride.)

the property—one dollar less than the value alleged in the complaint. That is admitted.

Judge WINN.—Yes. And I object to any testimony being offered. [59]

The COURT.—As to the amount due, of course, that is simply a legal conclusion.

Judge WINN.—Then I object to any testimony being offered under the amended answer in the case, under the cross-complaint, counterclaim, or whatever they are termed—there's two of them. It's immaterial.

The COURT.—It's a counterclaim. There is no provision for a cross-complaint except in equity proceedings.

Judge WINN.—We object further for the reason that the damages sought to be recovered, if any, are speculative, remote and uncertain and such damages as cannot be recovered under the allegations set forth in either or both of these counterclaims or causes of action, whatever they're termed, in the third amended answer; and that there is nothing pleaded in either one of them that lays any foundation, even though such damage could be recovered, for the recovery of such damages. There is no foundation laid for the recovery of the profits that they have sought to recover, for the reason that if that is a profit that could be recovered under certain circumstances, the complaint is insufficient, or the cross-complaint or counterclaim, or whatever they term it, in the facts which are stated. In other words, it does not state anything, only the

(Testimony of J. C. McBride.)

bare provision in each one of them that they were to receive a certain percentage on the gallons sold of the products to be furnished by the Union Oil Company, and they claim that as an entire profit and claim to recover on that entire amount. No such recovery under any circumstances could be recovered [60] in any cause of action, even though future profits could be recovered where a seller who has not broken the contract, but the vendor has broken the contract with him, because there is not sufficient pleaded. There are other facts to be established before they can do that, and I think the law is pretty plain on that proposition. However, I may state to the Court that the demurrer and these objections can be raised now or at any other time during the course of the trial of the case. I want to raise the proposition that each one of these counterclaims, or causes of action, come within the statute of frauds and there could be no recovery of such allegations, because they are within the statute of frauds.

Now, that may possibly take some testimony, your Honor, to establish that fact. I concede that. But I don't want to lose track of that, for, under the pleadings, I think we can show the Court that the statute of frauds is raised beyond question, and at some stage I want to argue it.

The COURT.—You better concisely state your reasons and then I'll hear you on the argument fully.

Judge WINN.—Hear it now?

(Testimony of J. C. McBride.)

The COURT.—If you desire to.

Judge WINN.—I consider, your Honor, that possibly on the question of the statute of frauds, that there will have to be some evidence before the Court, in order that the Court may pass upon it. Now, upon the other matters, as to their being remote and speculative damages, such [61] as cannot be recovered, that is probably raised by the demurrer. The only question I desire to call your Honor's attention to the fact that the contract, under which the Union Oil Company was to pay them so much a gallon on the sales which they made, which they had absolutely to sell under the nature of the pleadings, it is not possible to recover any such profits.

The COURT.—No; I think you misunderstood it. As I read the affirmative answer—of course, the defendant sets up, in its first affirmative answer, the written contract, and there is one clause in there—I have forgotten the number of the clause—in relation to the furnishing of oil for the ordinary requirements of the territory referred to in another clause. The defendant has given one construction to that with which perhaps the plaintiff takes issue. The contract itself may be somewhat ambiguous. When I overruled the demurrer, I took that into consideration, that it might be considered ambiguous and the matter might be argued out on the trial of the case as to what the proper construction of that clause of the contract was. If the plaintiff was required, under that contract, to furnish the

(Testimony of J. C. McBride.)

defendant with all the oil that might be required for the territory referred to as Juneau and the plaintiff failed to do that, that would be a breach of contract, and if the defendant had procured sales of a quantity of oil which defendant had failed to procure from the plaintiff in accordance with the contract, I should think [62] that the measure of damages would not be speculative, but would be direct, in that the damages would be the amount of the compensation that would be allowed to the defendant for the sale of that oil.

The other contract, of course, is an oral contract running for a period of three years and that has got to be proved. As to the contract that was entered into and the terms of the contract as alleged by the defendant, it is for it to prove what the terms are.

For that reason, I'll overrule the motion as to the speculative part of the damages alleged and allow the testimony offered to that effect to go in. I don't think myself that that part of the affirmative answer which alleges that the defendant expended a lot of money in preparing to go on with the contract has anything to do with the damages. The damages are not based upon that. That is the way I read the pleadings.

* * * * *

Q. (Examination by Mr. FAULKNER resumed.) Mr. McBride, did you state your name?

A. J. C. McBride.

(Testimony of J. C. McBride.)

Q. What office do you now hold? What are you doing now?

A. I'm Collector of Customs at the present time.

Q. For Alaska? A. For Alaska.

Q. Are you connected with the C. W. Young Company, the defendant in this case?

A. Yes, sir.

Q. In what capacity? A. President. [63]

Q. How long have you been president of that company? A. Since 1906.

Q. Continuously? A. Yes.

Q. Were you president in the years 1914, 1915, 1916, 1917 and 1918? A. Yes, sir.

Q. Were you also manager of the company?

A. Yes, sir.

Q. Now, in what business is the C. W. Young Company engaged?

A. Wholesale business; mercantile business.

Q. Wholesale?

A. Retail and wholesale mercantile business.

Q. Where is their business conducted?

A. It's on the corner of Front and Ferry Way. I think 46 Front Street.

The COURT.—He means, in what town.

Q. What town? A. Juneau, Alaska.

Q. In what territory do you do business?

A. Alaska.

Q. What part of Alaska?

A. Southeastern Alaska.

Q. Now, Mr. McBride, did you have any negotiations with the Union Oil Company of Cali-

(Testimony of J. C. McBride.)

ifornia in the year 1914 or early in the year 1915, regarding the sale of Union Oil Company's products? A. Yes, sir.

Q. What were those negotiations? [64]

Mr. KELLEY.—Just a minute. The plaintiff objects to the introduction of this testimony for the reason that under the pleadings and under the proof which is now being attempted to be introduced, such a contract is oral and is for more than one year and is barred by the statute of frauds.

The COURT.—I'll hear from you on that.

Mr. FAULKNER.—If the Court please, I don't think that this would be just the time to raise that question. I think that the testimony will develop that the contract was acted upon by both parties during the period of something over two years.

The COURT.—Well, objection overruled. If you can show that, that changes the situation.

Judge WINN.—May we ask a preliminary question, Your Honor?

The COURT.—Yes.

Q. (By Judge WINN.) You stated that you had some arrangement with the Union Oil Company at the time specified in Mr. Faulkner's last question. With whom did you have those arrangements?

The COURT.—Now, wait a moment. You haven't got that right. He stated he had some negotiations. He didn't say arrangements.

Judge WINN.—Oh, didn't he?

(Testimony of J. C. McBride.)

Mr. FAULKNER.—We will offer to show all that.

Q. (By Mr. FAULKNER.) You had some negotiations, you say, Mr. McBride?

A. Yes, sir.

Q. Now, where were those negotiations conducted? [65] A. In Seattle.

Q. With whom? A. Mr. George Clagett.

Q. Who was Mr. George Clagett?

A. He was the agent of the Union Oil Company.

Q. What was his office? What office did he hold? A. He was manager.

Q. Now, Mr. McBride, where were you in the months of December, 1914, and January, 1915, if you remember?

A. Well, I was here in December and in Seattle in January.

Q. You went to Seattle in January?

A. Yes, sir.

Q. Do you remember how long you remained in Seattle?

A. It was quite a while. I don't remember just how long.

Q. About how long would it be—six weeks or a month?

A. Six weeks, or something like that.

Q. Now, at that time, Mr. McBride, did you enter into any arrangements with the Union Oil Company for the handling of their oil and products in Juneau—

(Testimony of J. C. McBride.)

Judge WINN.—(Interrupting.) We object to that—

Q. (Continuing.) Territory known as “Juno”?

Mr. KELLEY.—We object to that as calling for a conclusion.

Judge WINN.—Calling for a conclusion of the witness and is not the best evidence, and it is immaterial and not binding on the plaintiff corporation in this case. To make a contract, if your Honor please, especially upon which profits, prospective profits can be based it takes a contract made with a corporation. Now, then, if he had a contract, we want to know whether it is in [66] writing, with whom he made it, and so forth, because that’s all denied.

Mr. FAULKNER.—We haven’t come to that yet.

Judge WINN.—Well, I know, but he is asking now about arrangements he had with the Union Oil Company. Well, now, who is the Union Oil Company? What were those arrangements? With whom were they made? Were they in writing, or were they oral? Were they with anybody who had authority to bind the company? We’re entitled to know that, if your Honor please.

The COURT.—Objection overruled at the present time—simply preliminary.

Q. What were those? Just state briefly what arrangements you made down there and with whom?

(Testimony of J. C. McBride.)

Judge WINN.—The same objection. Now, he asks what arrangements he made, which would include the making of a contract that they might predicate some cause of action upon.

The COURT.—Objection overruled.

A. I made an oral contract with the manager of the Union Oil Company to sell oils—refined and lubricating oils—in southeastern Alaska.

Q. Now, Mr. McBride, with whom did you have that contract? A. Mr. Clagett.

Q. Now, in negotiating this contract, what was done?

Judge WINN.—The same objection.

Q. With whom did you talk and what did you do?

Judge WINN.—No authority shown. [67]

Q. What was done? [67]

Mr. FALKNER.—Leading up to the contract. Simply preliminary. A. What did I do?

Q. Yes, and what did Mr. Clagett do?

The COURT.—Objection overruled.

Judge WINN.—There will be an exception, if your Honor please. I don't want to encumber the record to ask each time.

The COURT.—You may proceed.

A. You asked me what did I do?

The COURT.—What you did and what Mr. Clagett did.

A. Well, I went to Mr. Clagett—first, before I went below, during the season of 1914; that is, the year 1914, I discussed with different cannerymen,

(Testimony of J. C. McBride.)

different boatmen and fishermen here that owned boats—

Judge WINN.—(Interrupting.) Now, I object to the testimony, if your Honor please, as not responsive to the question. Furthermore, there is no inducement plead for his entering into this contract. We have asked for a bill of particulars. If he had a contract at all, he had a contract as set up in his answer. There is no inducement that lead him to enter into it; there is nothing said that he had this or that and the other thing and induced Mr. Clagett, acting on the part of the plaintiff, to enter into the contract. There is no damages asked in this case except upon specific contracts for sales which are set forth in the bill of particulars and he is confined to those in this case. Now, this rambling testimony of what he knew about it [68] and what could he have done and so forth, is not plead. It wasn't an inducement. It is no part of the oral contract and it is no part of the written contract. Now, I suppose that he is taking these contracts in the order in which they are set up in their answer, and the first one that is set up, is a written contract. Then all the terms and conditions of that written contract are absolutely perfect and complete. They cannot be varied by oral testimony. There is no fraud and no mistake—nothing alleged save as to the time and conditions of it. Hence he cannot testify to this. There is no inducement plead before, for the entering into of this contract. Perhaps if he had gone

(Testimony of J. C. McBride.)

down there and induced the company, through one of its managers or whoever had authority to bind the company, to do thus and so, by certain inducements, it would be different; but they should plead this inducement. They specify and allege these contracts themselves for 1917 and seek to recover on orders from certain parties whose names, private persons and corporations, are set up in the bill of particulars in this case, and they will have to confine their evidence to that.

Mr. FAULKNER.—If the Court please, these questions go to the second affirmative defense, because that is the logical order of the defense.

The COURT.—That goes without saying. The Court will not attempt to alter the order of proof or say as to which cause of action you will direct testimony to. However, I think your testimony should be limited to [69] the exact transaction with reference to the contract itself.

Mr. FAULKNER.—I think so.

The COURT.—And not to any preliminary matters, or what induced Mr. McBride to enter into the contract. So I will sustain, strike out that portion of his testimony. The testimony should be directed to what he and Mr. Clagett did together, jointly, in making the agreement, in pursuance of the agreement, at that time in Seattle. You can confine your testimony to that.

Q. What was the contract entered into with Mr. Clagett? A. Well—

(Testimony of J. C. McBride.)

Judge WINN.—The same objection. No foundation laid for answering the question; no authority shown on the part of Mr. Clagett to bind the company, either on any oral or written contract in the case. No foundation laid for him to answer the question.

The COURT.—Objection overruled.

Q. What were the terms of the contract, Mr. McBride?

A. The terms of the contract were that I was to build a dock at Juneau, on Gastineau Channel—

Judge WINN.—(Interrupting.) Now, wait, if your Honor please; we object to this part of it because there is nothing in the pleadings in the world in his second cause of action that says anything about it, that the contract was based upon the inducement that he was to build a dock. So far as that is concerned, there is no issue raised in this case, if your Honor please, but that Mr. McBride had the facilities. They haven't asked to recover [70] anything in this case for those facilities. That isn't an issue in the case at all. The building of the wharf is no part of the contract. It isn't an inducement. They don't seek to recover for the expense of building it or the expenses of maintaining it. He simply, in the complaint, in their complaint or pleadings, seek to recover what they allege as actual damages on the contracts of sale as figured up in the bill of particulars in this case.

The COURT.—I think the second cause of action

(Testimony of J. C. McBride.)

sets forth, as a consideration, the building of the wharf, and the objection is therefore overruled.

Q. What were the terms of the contract?

A. I was to build a dock to handle the oil for sale in southeastern Alaska, and they were to pay me a commission for selling the oils.

Q. Now, was there anything else you were to furnish besides a dock?

Judge WINN.—We object to it as incompetent, irrelevant and immaterial under the pleadings.

The COURT.—Objection overruled.

A. I was to furnish a place for a man to live in and a place for boats to land and service of my store.

Judge WINN.—I move to strike that out. There is nothing in the world in the pleadings in this case. He said he was to furnish a dock. There is nothing said about services and nothing about a residence and nothing about any boats.

The COURT.—Oh, yes it does. [71]

Judge WINN.—About a residence?

The COURT.—Storage facilities for handling and selling the commodities. That is a consideration mentioned in the contract. Objection overruled.

Judge WINN.—Allow us an exception, if your Honor please.

The COURT.—You may take your exception.

Q. Now, Mr. McBride, you say you were to furnish the facilities you have mentioned?

A. Yes, sir.

Q. What was the Union Oil Company to do? What did Mr. Clagett agree to furnish?

(Testimony of J. C. McBride.)

A. He agreed to furnish me with the oil for sale—lubricating oil and refined oil.

Q. How much oil? A. All that I could sell.

Q. All that you could sell. A. Yes, sir.

Q. In what territory? Any limitations put on it? A. In southeastern Alaska.

Q. Now, Mr. McBride, do you have in your mind now and can you tell us the commission that you were to receive and on what terms you were to sell this oil?

A. On refined oil I was to receive one cent a gallon and on the lubricating oil, under our oral contract, I was to get ten per cent, but later I got two cents a gallon.

Q. When was that changed?

A. That was changed the third year.

Q. In 1917? A. Yes, sir. [72]

Q. So, for the years 1915 and 1916, you were to get a cent a gallon on the oil?

A. On refined oil.

Q. Refined oil. And ten per cent of the price was it— A. Yes.

Q. (Continuing.) Of the lubricating oil?

A. Yes, sir.

Q. And what on greases?

A. It was so much a pound. I don't recall that right now.

Q. Now, Mr. McBride, did you have any, after you made this contract that you speak of, did you have any correspondence or any memorandum in writing from the company or from Mr. Clagett referring to this contract? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. I'll hand you here a letter dated March 1, 1915, and ask you where you received that, and whose signature that is?

A. That is Mr. Clagett's signature and I received it at our office from the Union Oil Company in Seattle.

Mr FAULKNER.—Now, we'll offer that in evidence.

The COURT.—You offer this in evidence?

Mr. FAULKNER.—Yes.

Judge WINN.—No objection.

The COURT.—It may be received.

Q. Where were you when you received this letter?
A. In Juneau.

Q. Well, just look at it again.

A. Oh, this letter here (indicating)?

Q. Yes.

A. Oh, at Seattle; at the Rainier-Grand Hotel.

[73]

Mr. FAULKNER.—We'll offer that as Defendant's Exhibit "A."

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "A," and afterward read by Mr. Faulkner, said letter being in words and figures as follows, to wit:)

Defendant's Exhibit "A."

"Seattle, Wash., March 1, 1915.

"The C. W. Young Co.,

"Mr. J. C. McBride,

"Care Rainier-Grand Hotel,

"City.

"Dear Sir:

"In confirmation of our various conversations in the past and referring particularly to phone conversation with you this morning, I take pleasure in stating that we are now ready to ship our oils to Juneau to be handled by you on a commission basis on the following terms and conditions:

"You are to furnish the necessary dock, warehouse, etc., together with appliances necessary for handling the oils, we in turn to pay you 1¢ per gallon commission for handling same, both in bulk and cases, on refined oils, and a commission of 10 per cent on lubricating oils, together with commission of 1/2 cent per lb. on all greases.

"The oils will be consigned to our own account at Juneau, and all transactions will be handled in our name.

"Prices at all times will be under our control, and you will be expected to abide strictly by the prices we give you from time to time. We naturally expect to be in position at all times to meet the price made by the Standard Oil Co., but are not in favor at any time of quoting under their established prices, for the reason that this leads to price competition, which is fatal.

“Our selling prices at the present time in Juneau will be as follows:

“Gasoline, bulk, 14½¢ per gallon.

Gasoline, cases, 21¢ per gallon.

Benzine, bulk, 13½¢ per gallon.

Benzine, cases, 20¢ per gallon.

No. 1 engine distillate, bulk, 10¢ per gallon.

Water White oil, bulk, 12½¢ per gallon. [74]

Union kerosene, cases, to boats 23¢ per gallon.

Union kerosene, cases, to store trade, 19½¢ per gallon.

Exray kerosene, cases, to boats, 31¢ per gallon.

Exray kerosene, cases, to store trade, 29¢ per gallon.

Aurora kerosene, cases, to boats, 24½¢ per gallon.

Aurora kerosene, cases, to store trade, 22½¢ per gallon.

“We market our Union kerosene against the S. O. Co’s Pearl Oil; our Aurora against their Eocene, and our Exray against their Elaine. Our Gasoline, of course, we market in competition with their Red Crown.

“Prices on various lubricating oils will be as follows:

“Medium Motoreze, barrels, 52¢ per gal.”

Judge WINN.—I don’t think that it is necessary to read all that.

Mr. FALKNER.—No; there’s several pages of prices, etc.

Judge WINN.—There isn’t anything in that for the jury to consider.

(Reading resumed by Mr. Faulkner.)

* * * * *

“We have given you above a general list of our

various lubricating oils, but do not expect to ship you a full stock of these oils for the reason that you will only be developing trade in them gradually. From the prices given you, it will enable you to quote intelligently on oils such as you might need at some future time.

“Our Motoreze is the best oil on the market for automobiles. Would recommend light Motoreze for truck use around Juneau, or medium or heavy, if the cylinders are much worn. We sell a great deal of heavy Motoreze to large gas boats with heavy duty engines.

“Our Ideal gas engines we market in competition with the Standard Oil Co.’s Standard gas engine.

“Perfecto gas engine is a better grade.

“Topaz gas engine is the cheapest oil we have and is a good oil for the money.

“Our Union gas engine is similar to heavy Motoreze for use in heavy duty engines. [75]

“We are also marketing for automobile users four more grades of automobile oil, namely, Union Auto, Union Auto X, Union Auto XX, Union Auto XXX. Union Auto is an excellent oil for Ford machines or new cars. The X, XX and XXX are of the same characteristics, but heavier in body. They are all A-1 oils for automobile use or gas engine lubrication of any kind.

“Our Oleum valve oil is especially adapted for wet steam conditions. This oil contains the necessary compound of high grade animal oils to produce the best possible results where wet steam

conditions prevail. Suitable for any steam pressure.

“We also have an Oleum mineral valve oil which sells at the same price, which is a strictly mineral oil and contains no compound. Suitable for any steam pressure.

“Our Union cylinder W. S. has high fire test and great viscosity. This oil is compounded, and is an oil of great endurance. Used principally for wet steam conditions. Suitable for 125 to 200 lbs. steam pressure.”

Mr. FAULKNER.—The next two pages simply describe the characteristics of the oils. There is nothing material about that. Simply takes up the time of the jury.

* * * * *

“Our prices on grease will be as follows:

“Barrels, 7¢ per lb.

Half Barrels 7½¢ per lb.

50# pails 9¢ per lb.

25# pails 9¢ per lb.

10# pails 10¢ per lb.

5# pails 10¢ per lb.

1# cans 11¢ per lb.

“Grease comes in various consistencies numbered 3, 4 and 5. #3 grease would be suitable for your trade, or we can give you #2, which we term our transmission heavy. #4 and #5 would be almost too hard for use in your territory.

“In the first shipment we make you, we will send you a complete set of samples of our various grade of lubricating oil, together with samples of greases.

“Shipments will be made you in iron drums holding from 105 to 110 gallons each. All of these drums bear a large brass plate with the number of the drum thereon. The capacities of the drums are marked on the hoop near the side bung. You will find the number of gallons [76] the drum holds stamped thereon.

“We use the following colors to designate the various commodities. The heads of the drums are painted with these colors, as follows:

Kerosene, white.

Distillate, blue.

Benzene, red.

Gasoline, red.

“In addition, the name of the product is stencilled on each end of the drum.

“The value of these drums is \$10.00 each, and any one desiring to take a drum from your premises, you will require them to put up a deposit of \$10.00, which will be returned to them when the drum is returned to you. It is very important that you keep a complete record of all drums coming in and going out. In making shipment from Seattle, we send you along a statement of the drum numbers and capacities. On receipt of shipment, you will check carefully the numbers of these drums, and see that there are no errors. If you should find any errors in reporting the numbers, report same promptly to us. Great care should be exercised in reading the numbers of the drums; otherwise, a 6 might be taken for a 9, and *vice versa*.

“In making sales to a customer where a drum is included, you will show on the back of the order form, in the space provided, the number of the drum and the capacity. When customer returns a drum, you will enter same on form #160, a supply of which we are sending you and, a sample of which is attached. This report is to be mailed us each week, together with your orders, etc.

“In the event of drums being delivered to responsible parties, such as canneries, credit for which we will authorize, or delivered around town where the drum is under your supervision, it is very important that the drum numbers be reported to us promptly for credit. Do not fail to show this on your order when sent in.

“When you return drums to us at Seattle, always list the drum numbers on the shipping receipt, sending us same promptly. This is very important.

“All sales are to be reported on form #C-204, which form is printed in triplicate. The original is to be sent to us, the tissue copy to remain in the book for your records, and the other copy to be given to the customer. We are attaching a copy of this report, so that you may see what information is necessary for our records. [77]

“Form 204-B is the regular salesman's order form; these you can use in taking orders. The orders when filled to be shown on form C-204.

“In order that you may keep an accurate record of your stocks on hand, and guard against losses,

etc., you will use form C-174. This is a combined stock and sales report.

“We are attaching a sample showing how this report is to be made out. Same should be sent to us each week. At the top of the report, you will show the amount of oil on hand to begin with; on the next several lines, you will show stock that is received from Seattle; below that you will show sales, itemizing same, using a line (or more if necessary) for each order; at the end of the week, you total your orders, the total of which subtracted from the stock on hand to begin with, plus your receipts, will show what you have left. This report is to be used for the refined oils only.

“Form #476 is to be used in connection with your grease stock and sales. It will not be necessary to list your orders, but you will show your stocks on hand, stocks received, stocks sold, and stocks on hand P. M. in one amount under the column showing the different size packages.

“Form #258 is to be used in connection with your lubricating stock and sales. This form is made out exactly the same as form #476 for grease.

“All sales made by you will be strictly for cash, with the exception of oils delivered to canneries, which you know to be on a sound business basis, and to the general store trade in Juneau, which would be entitled to credit. This refers, of course, to the leading merchants in Juneau. No other credits will be approved by us until first referring the matter to this office, and should you charge out any goods to others than those referred to, we will of

necessity be compelled to charge same to your own account. We will forward you a supply of our form 311, covering credit information from those who desire to purchase from us.

“We would not authorize you to quote on cannery business for shipment direct from Seattle. There is a certain amount of this trade that will always purchase their oils direct from us at Seattle, or the Standard Oil Co., and we do not want you to quote to these concerns a delivered price. The only opportunity you will have of selling the canneries is for what surplus they might require and which they might go to Juneau for. [78]

“With respect to iron drums, we wish to particularly caution you about the handling of these. They should not under any circumstances, be allowed to depart from your care, excepting to responsible merchants and canneries around Juneau, and then only on condition that a charge of \$10.00 per drum is made, which will be written off upon return of the drum. These drums, as said, are all plated with numbers, and we keep track of these numbers very carefully, and when you allow a drum to leave your possession to anyone whosoever, a record of the number of same must be kept, and to whom charged, and when the drum is returned, a notation or credit made to that effect. A deposit of \$10.00 cash must be made by those taking drums who do not come under the caption of canneries or responsible merchants. On drums to the canners, it may be possible that some of them may find their way back to Seattle. In such cases,

(Testimony of J. C. McBride.)

we having a record of these drums charged to you, will immediately advise you of their return, and you can thus keep your records straight. We think you will find that the Standard Oil Co. is holding all their customers down to a cash basis at Juneau, except possibly the very largest merchants there. Your business, therefore, should be on a cash basis, as this is much more satisfactory to all concerned. If you find any deviation from this method on the part of the Standard Oil Co., kindly let us know at once.

“This letter has been written you in a hurry, and there are a number of points probably which I have not covered which will come along at a later date, and on which we will instruct you. In the meantime, if there is any other information you desire, kindly let me know, and we will give same our prompt attention.

“Yours truly,

“UNION OIL CO. OF CALIFORNIA,

“By GEO. D. CLAGETT,

“District Manager.”

Q. Now, Mr. McBride, you stated—I think you stated that under this agreement you were to furnish the necessary facilities for handling the oils of the Union Oil Company? A. Yes, sir.

Q. And you stated, I think, further that Mr. Clagett promised that they would supply you with sufficient oil for the southeastern Alaska trade?

A. Yes, sir.

(Testimony of J. C. McBride.)

Q. Now, after that letter of March 1, 1915, was received, [79] Mr. McBride, did you return to Juneau? A. Yes, sir.

Q. Before you returned to Juneau, what steps were taken, if any, toward furnishing the facilities mentioned in the letter which I have just read?

A. I went—

Mr. KELLEY.—Just a minute, may it please your Honor. The plaintiff admits that the C. W. Young Company furnished such storage facilities, which were satisfactory to the plaintiff.

The COURT.—Very well.

Mr. FAULKNER.—Well, I just wanted to make the record clear on that point, as I stated before, so that I will be able to save my contention in the record that the cost of furnishing the facilities should be taken into consideration in estimating the damages from the breach of contract on the part of the plaintiff, and this question is simply a preliminary question.

Judge WINN.—This admission will save his contention.

Mr. FAULKNER.—Well, perhaps it will. Now, in order to get the matter before the Court, so that the proper objection can be taken, I will ask Mr. McBride what was the cost of the dock. You needn't answer this until after the objection is made.

Q. Now, what was the cost of the dock and the tanks and the storage facilities and warehouse

(Testimony of J. C. McBride.)

which you furnished for handling these oils, pursuant to the contract entered into with Mr. Clagett?

The COURT.—You needn't answer that. [80]

Mr. FAULKNER.—Now, if the Court please, I think the record will be sufficiently saved by making that.

Judge WINN.—Well, I want to make an objection.

The COURT.—Certainly.

Judge WINN.—We object to the question, if your Honor please, on the ground that it is irrelevant and immaterial under the issues in the case; that there is nothing to be sought, nothing sought to be recovered in this case for the price or the cost of the facilities for handling the products of the Union Oil Company, and nothing sought to be recovered for the maintenance and the equipment. The defendant in its cross-complaint or counterclaim, whatever it may be termed, or in the third amended answer, seeks to recover on the loss of profits and profits only, and there can be no recovery in this case for any expenditures he may have made for facilities to handle the products of the Union Oil Company. In the first place, it is not sufficiently pleaded—there is nothing of that kind appears in the pleading, and in the second place because, in order to recover that, the pleadings would not be sufficient, because it would not state the expenses and so forth and so on for maintaining and so on of the facilities. Now, if your Honor, will notice the pleading, he will see that it

(Testimony of J. C. McBride.)

goes on and sets up that they did furnish facilities in the way of a wharf and building and so forth and so on. That's all right. The contract says that: but the other elements entering into it are absolutely immaterial; absolutely immaterial. Then he goes ahead and says the reason he seeks recovery is that he lost so much percentage on certain number of gallons and so much on gasoline [81] and so much on certain lubricating oils, and they are confined absolutely to those identical items.

Mr. KELLEY.—I don't know what the practice is in this court, your Honor, but I would like to inquire if it is proper for those questions of law—I see that Mr. Faulkner has got a lot of books stacked up on his desk—is it proper that these questions of law be argued before the jury?

The COURT.—The jury may be excused.

(Whereupon argument was had on the question of the admissibility of evidence in regard to the cost of facilities for handling oil.)

The COURT.—I'll sustain the objection and allow you an exception.

Mr. FAULKNER.—Before the Court does that, I would like to have read to the Court or to me, from the notes, the admission of Mr. Kelley as to the furnishing of the facilities. I want to get that. I want to know if it is admitted that these facilities were furnished after the contract was entered into.

Mr. KELLEY.—No; no. That is, you mean, built afterwards?

Mr. FAULKNER.—Yes.

(Testimony of J. C. McBride.)

Mr. KELLEY.—No.

Mr. FAULKNER.—I want to prove that they furnished the facilities after the contract was entered into.

(Whereupon the jury was called into the box and the examination of Mr. McBride resumed.)

Q. Mr. McBride, you say that you furnished a dock and warehouse and storage facilities for handling the oil? A. Yes, sir.

Q. Now, when was this dock and the facilities furnished? [82]

A. When the—

Q. I mean, was it after the contract mentioned or before.

Judge WINN.—Object to it as being leading. Let him state what he did.

The COURT.—Objection overruled.

A. It was after.

Q. After. A. Yes.

Q. Now, under that contract or agreement that you had with Mr. Clagett, you say that Mr. Clagett promised that he would supply the Union Oil Company here with a supply of oil sufficient to meet the requirements of the trade in Alaska?

Judge WINN.—Just a minute. The plaintiff objects. That letter that Mr. Clagett wrote doesn't so state.

Mr. FAULKNER.—That doesn't make any difference.

The COURT.—Objection overruled. He is testifying to an oral contract.

(Testimony of J. C. McBride.)

Q. You stated that that was the agreement?

A. Yes, sir.

Q. Now, Mr. McBride, under that agreement did you receive any oils from the Union Oil Company?

A. Yes, sir.

Q. During what period?

A. During the period of 1915, 1916 and 1917.

Q. How far did you go into 1917 before the agreement was changed? A. Into February.

Q. February of 1917? A. Yes, sir. [83]

Q. So that from March 1, 1915, until February, 1917, you did receive oils under this contract from the Union Oil Company? A. Yes, sir.

Q. And did you sell those oils? A. Yes, sir.

Q. As you had agreed? A. Yes, sir.

Q. Where?

Judge WINN.—Object to it as incompetent, irrelevant and immaterial, unless he is confined to the items which they seek to recover damages on.

Mr. FAULKNER.—This is just simply a preliminary question.

Judge WINN.—Any sale except those mentioned in the bill of particulars, is not admissible. Whether he sold any other oils is absolutely immaterial.

The COURT.—Objection overruled. Simply preliminary.

Mr. FAULKNER.—There is another question. The question of the statute of frauds was raised and I wanted to know whether they acted on the contract in accordance with its terms.

(Testimony of J. C. McBride.)

Q. Where did you sell the oil?

A. Sold it in Alaska.

Q. In Alaska. Now generally to whom? I don't mean to state in detail—

Judge WINN.—I object to it as incompetent, irrelevant and immaterial. Don't tend to prove any of the issues in the case and is not included within the bill of particulars, upon which the suit of damages in this case is predicated for the loss of profits.

The COURT.—Repeat the question. [84]

(Question repeated by reporter.)

The COURT.—Objection overruled.

A. Sold it to cannerymen and fishing boats, launches.

Q. Any mines? A. Mines and automobiles.

Q. Now, did you sell all the oil that was demanded during those two years?

Mr. KELLEY.—Just a minute. Object.

Judge WINN.—The same objection, your Honor please. Not a matter on which any damage is predicated in this case; absolutely immaterial under the issues.

The COURT.—I'll hear from you.

Mr. FAULKNER.—Oh, I think it is. The question is this: He says they entered into this contract to sell this oil and the Union Oil Company promised to furnish him with sufficient oil for the requirements of the territory. Now, I want to show whether they did that or not.

Mr. KELLEY.—That isn't the question.

(Testimony of J. C. McBride.)

Mr. FAULKNER.—What is that?

Mr. KELLEY.—That isn't the question.

Mr. FAULKNER.—That is the question I asked him, or at least—

The COURT.—Repeat the question. (Question repeated by reporter.)

Judge WINN.—Goes right to the main issues of the case.

Q. Mr. McBride, did the Union Oil Company furnish you with all the oil that was demanded and required to furnish the trade in the territory during that period? [85]

Judge WINN.—Object to the question, for the reason that there is a certain amount of damages that is sought to be recovered for the loss of profits of certain sales which he says he could have made or which he says he had orders for, and he has set up in his bill of particulars the names of the individuals and the different corporations, and so on, that he says he could have sold to, and as to how much was sold and what his loss of profits were in each instance, and then he sets up some other matters. That bill of particulars was furnished, if your Honor please, under a demand made under the statute. Now, then, as to whether or not generally, during this period of time, he received oil sufficient to supply the market or supply other purchasers or anybody else except those that are mentioned in the bill of particulars, is not an issue in this case at all. He is bound by those that he has given to us, because we can't meet a proposition of

(Testimony of J. C. McBride.)

that kind after he furnished us with a bill of particulars that he is supposed to rely on. He figures it all up at the bottom of the particulars, the bill of particulars, and it is the same amount that they pray judgment for.

The COURT.—Objection overruled. The question is preliminary.

Mr. KELLEY.—We save an exception.

The COURT.—Don't go into details.

Mr. FAULKNER.—Yes.

The COURT.—Of course, you are bound, confined as to what is set forth in the bill of particulars.

Judge WINN.—Allow us an exception. [86]

The COURT.—Objection overruled.

Mr. FAULKNER.—On that question, I would like to be heard. I expect to offer some additional evidence.

(Following question repeated at request of Mr. Faulkner:)

“Mr. McBride, did the Union Oil Company furnish you with all the oil that was demanded and required to furnish the trade in the territory during that period?”

A. No, sir.

Q. Mr. McBride, did you have any orders for the sale of oils that you could not fill during that period? A. Yes, sir.

Q. Now, Mr. McBride, I will ask you, have you got a notation of those names, or can you give them

(Testimony of J. C. McBride.)

from memory—names of those whose orders could not be filled? A. I have a notation.

Q. You may refer to that memorandum. You have a memorandum of the orders you received and couldn't fill?

Judge WINN.—Well, now, if your Honor please, I just want to suggest this, that if Mr. McBride has some memorandum that he has made up different from the—

Mr. FAULKNER.—(Interposing.) No; it's the same.

Judge WINN.—(Continuing.) Bill of particulars,—

Mr. FAULKNER.—The same as the bill of particulars.

The COURT.—That is a memorandum you made out?

The WITNESS.—Well, it is a memorandum that was furnished here to the Court. It's a duplicate.

The COURT.—Very well.

Q. Now, Mr. McBride, will you give us the orders and the amounts of oil that could have been sold in the years 1915 and 1916 that you couldn't supply— [87]

Judge WINN.—We object to the question as incompetent, irrelevant and immaterial; no proper foundation laid for the question. No matter what it may be, it would not furnish any basis for recovery in this case. It would be, in this instance, barred by the statute of frauds. Then he indefi-

(Testimony of J. C. McBride.)

nately says "orders." Now, what constitutes orders? Are they verbal or are they written? If they are in writing, they ought to produce them, and show to whom and the amount with the price of the oils. Now, then, if he has orders, according to his own price and according to his own evidence that he could have sold at certain prices, and so forth and so on, as set forth in the bill of particulars, that don't constitute a contract of sale under the statute of frauds. He must do something else besides that, if your Honor please, and there is no foundation laid for the introduction of such testimony at this time, and it is barred by the statute of frauds, comes within the statute of frauds. Unless there is a better foundation and more evidence offered at this time, it's not admissible.

The COURT.—The only objection that I see to the question is that the question is too indefinite in that it doesn't ask why he couldn't furnish it. You say simply the orders that you couldn't furnish. Objection is overruled on the points raised.

Q. Now, Mr. McBride, just answer that question yes or no. Have you a memorandum of them?

A. Yes, sir.

Q. Why couldn't you fill those orders?

Mr. KELLEY.—To which we object. Calling for a conclusion of the witness. [88]

The COURT.—Objection overruled.

A. I didn't have the oil.

Q. Could you get the oil from the Union Oil Company? A. No, sir.

(Testimony of J. C. McBride.)

Q. Now, will you give us a statement of those orders for the years 1915 and 1916 first—

Judge WINN.—Now, if your Honor please, I presume that the witness is referring to the bill of particulars in this case. We make the objection that there is no sufficient foundation laid for the witness to answer the question. It is immaterial; not binding upon the plaintiff in this case and comes within the statute of frauds, and is not a contract that would be enforceable, and he has laid no foundation whatsoever for the introduction of the testimony.

The COURT.—You want to raise the question of the statute of frauds at the present time?

Judge WINN.—Well, I raise it now. I suppose the same objection will go to each one of these questions.

The COURT.—Objection overruled. He may answer for the present. You can move to strike it out later if it is within the statute of frauds. I don't think it is at the present. He may answer the question.

Q. For 1915 and 1916.

A. For 1915 and 1916?

Q. Yes. A. The oils that I had orders for?

Q. Yes.

A. Hoonah Packing Company of Hoonah; Hoonah Packing Company of—

Q. (Interrupting.) Just give the amounts. [89]

A. 50,000 gallons for 1915 and 50,000 gallons for 1916. Taku Canning and Cold—

(Testimony of J. C. McBride.)

Q. (Interrupting.) You left out the lubricating oil.

A. 2500 gallons for each year. Taku Canning and Cold Storage Company, 40,000—

Judge WINN.—(Interrupting.) Wait; wait. We urge the same objection that we urged before.

The COURT.—Objection overruled.

Mr. KELLEY.—My understanding is that the question asked him to read it all. He has only read it for 1915 and 1916.

Mr. FAULKNER.—That's all we're asking him.

Mr. KELLEY.—Oh; you didn't ask for that yet.

The COURT.—No; he is taking the second cause of action and proving that without reference to the first cause of action.

Q. Very well, the next?

A. Taku Canning and Cold Storage Co., 40,000 gallons for each year of 1915 and 1916 and 2,000 gallons for each year of lubricating oil for 1915 and 1916. Chichagoff Mining Company 25,000 gallons of—

Judge WINN.—Wait; wait. The same objection to the amounts he has for the Chichagoff Mining Company.

A. (Continuing.) Refined oil.

Judge WINN.—It is immaterial and comes within the statute of frauds.

The COURT.—There is no use of your interjecting objections all the time. You have got your objection to this for all these items for the years 1915 and 1916.

(Testimony of J. C. McBride.)

Judge WINN.—Well, if that is the understanding.

The COURT.—That is the understanding and you have got your exception. [90]

A. 1250 gallons—

Q. Now, the Chichagoff Mining Company.

A. 25,000 gallons in 1915—that's refined oil—and 1250 gallons of lubricating oil in 1916; the National Independent Fisheries launch "King & Winge" and "Scandia," 20,000 gallons for each year of 1915 and 1916, and a thousand gallons of lubricating oil for each year of 1915 and 1916; Pacific-American Fisheries Company, 30,000 gallons for each year, each of the years of 1915 and 1916, and 1500 gallons of lubricating oil for each of those two years; James Davis, 15,000 gallons for each year of 1915 and 1916, and 750 gallons of lubricating oils for each of those two years; Hunter and Dickinson, 5,000 gallons each for 1915 and 1916, and 250 gallons for each of those years, of lubricating oil, for those two years; launch "Rolfe," 2,000 gallons for the two years, 1915 and 1916, and a hundred gallons of lubricating oils for each of those two years; launch "Tillacum" 1,000 gallons for each year of 1915 and 1916, and 50 gallons of lubricating oil for those two years: "Anita Philips," 3,000 gallons for each of the years 1915 and 1916, and 150 gallons of lubricating oil for those two years; "Pete Madsen," 2500 gallons for each of those years of 1915 and 1916, and 125 gallons each year of lubricating

(Testimony of J. C. McBride.)

oil; launch "Morengen," 5,000 gallons each for 1915 and 1916, and 250 gallons each for those two years—

The COURT.—250 gallons each of what?

The WITNESS.—Lubricating oil. "Gypsy," 200 gallons of gasoline for each of those two years, and 10 gallons of lubricating oil for each year of 1915 and 1916; launch "Pacific" [91] 5,000 gallons each for 1915 and 1916 of refined oil and 250 gallons of lubricating oil for those years; launch "Olga" 2500 gallons each for 1915 and 1916 and 125 gallons of lubricating oil for those two years; launch "Orien," 2500 gallons each for the years 1915 and 1916 of refined oil and 125 gallons of lubricating oil for each of the two years; launch "Carita" 4,000 gallons each for 1915 and 1916 and 200 gallons of lubricating oil for each of those two years; Scandinavian Grocery, for 1915, 15,000 gallons— Now, this is an old memorandum I have, and I think it is 61,000 gallons for 1916.

Judge WINN.—What is that, the Scandinavian Grocery?

The WITNESS.—Yes.

Judge WINN.—Well, that isn't in the bill of particulars.

The WITNESS.—Yes, it is.

Judge WINN.—1916?

The WITNESS.—Yes, sir. 750 gallons lubricating oil. Now on this, Judge Winn, I haven't just the memorandum I made at that particular time. I have 750 gallons for 19—lubricating oil for 1915, but I haven't it for 1916.

(Testimony of J. C. McBride.)

Mr. KELLEY.—To which we object, to his interjecting anything further into the bill of particulars.

The WITNESS.—Well, this isn't a copy.

Mr. KELLEY.—Better see what the original shows.

Q. (Handing bill of particulars to witness.) Just state that last item again, Mr. McBride—Scandinavian Grocery.

A. 15,000 gallons in 1915, 61,000 gallons in 1916 of refined oil; 750 gallons for each year of lubricating oil for 1915 and 1916; "El Nido," 1500 gallons each for the years 1915 and [92] 1916—

Judge WINN.—(Interrupting.) Now wait. If your Honor please, we object to the Scandinavian Grocery, 750 gallons for each year. He only has 750 gallons on the bill of particulars, for 1916, if this bill of particulars is correct. Did you say each year 750?

The WITNESS.—Yes.

The COURT.—Proceed.

A. Launch "Chlopeck," 2500 gallons of refined oil each for 1915 and 1916 and 125 gallons of lubricating oil for each of those two years; launch "Caesar," 1500 gallons each for 1915 and 1916, and 75 gallons of lubricating oil for those two years; launch "Dolphin," 3000 gallons for 1915 and 3500 for 1916, of refined oil; 150 gallons of lubricating oil for 1915 and 175 gallons for 1916; Tenakee Fisheries, in 1916, 3300 gallons of refined oil; in 1916 lubricating oil, 165 gallons; Northwestern

(Testimony of J. C. McBride.)

Fisheries, in 1916, 3300 gallons of refined oil and 165 gallons of lubricating oil in 1916; Astoria and Puget Sound Canning Co., for 1916, 30,000 gallons of refined oil and 1500 gallons of lubricating oil; in 1916, George Naud—no; that doesn't come in. That's all in 1915 and 1916.

Q. Now, Mr. McBride, I will ask you to refer to your memorandum again and ask you if you furnished any of the orders that you couldn't fill for the reason stated, to the Hoonah Packing Company at Gambier Bay? A. Yes, sir.

Q. In 1915 and 1916?

Mr. KELLEY.—Is that on your bill of particulars?

Mr. FAULKNER.—Yes. [93]

A. When?

Q. In 1915 and 1916? A. Yes, sir.

Q. How much? A. 50,000 gallons.

Q. No; I mean at Gambier Bay.

A. What is that?

Q. Gambier Bay; Hoonah Packing Company for 1915. A. 40,000.

Judge WINN.—No; there isn't any for 1915. You have got 40,000 on the bill of particulars for 1917.

Mr. FAULKNER.—Well, the witness will know.

Judge WINN.—He is bound by the bill of particulars.

The COURT.—Now, wait a moment. There is no use—

(Testimony of J. C. McBride.)

Judge WINN.—We object to that, if your Honor please, because it isn't in the bill of particulars.

Mr. FAULKNER.—I am asking him the question.

The COURT.—He has asked him the question. Now, you're objecting that it is not in the bill of particulars. I'll hear from you.

Mr. FAULKNER.—Maybe it isn't. I don't know. I'm just asking him to state.

Q. Did you have any orders from the Hoonah Packing Company in Gambier Bay, in 1915 and 1916? A. No, sir.

Q. Now, did you have any from the Auk Bay Salmon Canning Co., in those years, 1915 and 1916?

A. Auk Bay Salmon Company? No, sir.

Judge WINN.—The same objection. Well, he's answered it now.

Q. Now, did you have any from the launch "Chlopeck" in those [94] years?

Judge WINN.—That's been given.

Q. I don't mean the launch "Chlopeck." I mean the launch "El Nido."

A. For those two years?

Q. Yes. A. Yes, sir.

Q. How much?

A. 1500 gallons for each year.

Q. Of lub— A. (Interposing.) Refined oil.

Q. What lubricating oil, if any?

A. 75 gallons for each of those two years.

Q. Now, the Pillar Bay Packing Company, did

(Testimony of J. C. McBride.)

you have any orders from that company for the years 1915 and 1916? A. In 1916 I did.

Q. How much? A. 1650 gallons.

Q. How much lubricating oil? A. 821½ gallons.

Q. Now, Mr. McBride, what is that total, for those two years, of refined oil? Have you got the total there?

A. I have the total for each year.

Q. What is it?

A. In 1915 it was 211,200 gallons of refined oil, and in 1916 320,950; total of lubricating oil in 1915 was 10,560 and in 1916 it was 14,747 gallons.

Q. Now, did you have any orders for any of this— Oh, I might ask you this: Did you have any other orders—don't answer this until it is objected to— did you have any other [95] orders for oils during those years of 1915 and 1916, which you have not mentioned, which are not included in the bill of particulars?

Judge WINN.—We object to it as incompetent, irrelevant and immaterial. He is bound by the bill of particulars in this case and the bill of particulars makes up the amount of damages which he is suing for. To go into this, it is absolutely immaterial and not within the issues of the case for two reasons: first, he has not supplied us with a bill of particulars and second, it would be increasing his amount of damages, which he has asked for. He is bound by the bill of particulars.

Mr. FAULKNER.—If the Court please, I think that on the question of damages, under that branch,

(Testimony of J. C. McBride.)

under that theory of the case, damages for speculative or lost profits, that we can show more than is alleged in the bill of particulars and we can show approximations and estimations of what oil might have been sold. Now, I have some authorities on that point, and, in fact, there are several cases in point. Here is one that I have right before me that I might just read the last paragraph of.

The COURT.—I think I'll hear you on that. I'll excuse the jury now till to-morrow morning at ten o'clock.

(Whereupon the jury was excused.)

Judge WINN.—Well, now, if Mr. Faulkner is going to argue this question, I would like to enlarge my objection to it, because I thought the law absolutely governs, irrespective of what decisions Mr. Faulkner can find. I'll state that we object to it as irrelevant and immaterial and not within the issues of this case, and inasmuch as on our demand, a [96] bill of particulars was furnished, showing a list of those corporations whom they say they made sales to or contracted to make sales to, they could recover damages on that only. Now, then, if he goes beyond that, I wish to state to the Court that we are absolutely taken by surprise, because we have had no opportunity to investigate the matter at all; and added to it, of course, are the further objections that it is speculative and remote, uncertain and not such damages as can be recovered, and also it comes within the statute of frauds, and especially do I think, if your Honor please, that under the statute

(Testimony of J. C. McBride.)

he is bound by this statement he has given us here. This would be very pernicious testimony to go before the jury.

Mr. FAULKNER.—There is nothing pernicious about it. I offer to prove some other orders that are not in the bill of particulars. Of course, the bill necessarily had to be prepared from fragmentary pieces of information, from copies of letters that were sent into the Union Oil Company, ordering supplies, and so forth, and from the memory of Mr. McBride and other witnesses and from the memory of some of the men who would have purchased the oil; and at the time the bill of particulars was filed, we did the best we could. Since then we have learned of other orders, other positive orders that were given, and I offer at this time to prove those. Now, I think the law is that where a person can estimate his damages and can prove the amount of business he did in previous years and the condition of the trade, and so on, that he ought to be able to prove a specific instance of damages, where a specific order was given for a specific amount of oil. [97]

(Whereupon after argument, the Court ruled as follows.)

The COURT.—I'll permit the evidence to go in at the present time. I will hear you on the question of the statute of frauds, although I will say that so far as I am concerned, I'm inclined to be against you unless you can show me authorities that this

(Testimony of J. C. McBride.)

comes within the statute of frauds. Objection overruled. You will be allowed an exception.

(Adjournment taken until Saturday, January 20, 1922, at 10 o'clock A. M.) [98]

Saturday, January 20, 1923.

Court met pursuant to adjournment at 10 A. M.

J. C. McBRIDE on the witness-stand.

Direct Examination (Resumed).

Q. (By Mr. FAULKNER.) Mr. McBride, you gave us some items last night of oil that you could have sold in the years 1915 and 1916, according to the list that you have furnished. What was the total amount of that?

A. Well, I have to determine that.

Q. Have you totaled it up?

Judge WINN.—I think he gave that.

Mr. FAULKNER.—Not the total.

The COURT.—No; he didn't give the total at all. He stated that he had it by years, but not the total sums.

A. The total sum for 1915 and 1916 was, refined oil, 532,150 gallons, and the total sum for those same years for lubricating oils was 24,307 gallons.

Q. What, under the contract that you have mentioned having entered into with the company, would be your commissions on the refined oil during those two years?

A. It would be one cent a gallon on the refined oil.

(Testimony of J. C. McBride.)

Q. What would that amount to?

A. It would amount to \$5321.50.

Q. And the lubricating oil?

A. At two cents a gallon would be \$486.14.

Mr. KELLEY.—Now, just a moment. We move to strike out the answer and question as being contradictory to the written letter which is already in evidence.

The COURT.—Motion denied, except as to the—
In what way? [99]

Mr. KELLEY.—It differs with the commission. It wasn't two cents per gallon; it was ten per cent.

Mr. FAULKNER.—If the Court please, I might ask the witness one or two preliminary questions as to whether or not that ten per cent would not amount to more than that. But we have only claimed two cents. Ten per cent would make it considerably more. You can readily see that.

The COURT.—Yes; motion denied.

Q. I might ask you, Mr. McBride, you have testified that the commission on the lubricating oil—Before we get to that, in order to complete it, what is the total of those two amounts?

A. \$5807.64, for 1915 and 1916.

Q. You have testified that the commission on lubricating oil for the years 1915 and 1916 was to be ten per cent of the price? A. Yes, sir.

Q. Now, would ten per cent amount to more than two cents a gallon? A. Yes, sir.

Q. How much more?

(Testimony of J. C. McBride.)

Judge WINN.—Object to that as immaterial. They have elected to stand on the other and the Court has just ruled that they can stand on it.

Mr. FAULKNER.—Very well. I just want to show that two cents per gallon comes within the ten per cent.

Q. Now, Mr. McBride, were there any other contracts for the sale of oil by you during those two years that you have not mentioned, that are not included in the bill of particulars? [100]

A. Yes, sir.

Judge WINN.—We object to it, if your Honor please, as incompetent, irrelevant and immaterial, and because it appears from the record in this case that the bill of particulars was demanded by the plaintiff from the defendant. As to what items they expected to charge us commission upon and what purported sales they desire to charge a commission upon, he furnished those and by doing so, the bill of particulars becomes a part of the pleadings. It is too late now to amend the pleadings again, and it is immaterial, and he is bound by the bill of particulars which he has furnished us. But as to the sales and as to any purported commissions that he may have claimed or may be entitled to in the case—

Mr. FAULKNER.—Would the Court like to hear from me on that?

The COURT.—Objection overruled. He may answer.

Mr. KELLEY.—Exception.

(Testimony of J. C. McBride.)

Q. Just answer that question yes or no.

A. Yes, sir.

Q. Now can you give us any items that were not mentioned in your testimony yesterday and are not included in the bill of particulars.

Judge WINN.—The same objection to this question, if your Honor please.

The COURT.—Overruled.

Judge WINN.—Yes; allow us an exception.

A. Orders from Mr. Bayers.

Q. What would that order amount to, Mr. McBride?

Judge WINN.—The same objection to each one of these questions, if your Honor please. [101]

A. Five hundred drums.

Mr. KELLEY.—Just a minute. What was his name?

A. Tay Bayers; H. G. Bayers; B-a-y-e-r-s.

Q. How many gallons would be in a drum?

A. Well, approximately a hundred and five; approximately from 105 to 110.

Q. And that 105 gallons to the drum, as a matter of computation, would be how many gallons? What would 500 drums amount to?

Judge WINN.—The same objection, if your Honor please.

The COURT.—Overruled.

A. It would be 52,500 gallons.

Q. Was any part of that order filled?

A. No, sir.

(Testimony of J. C. McBride.)

Q. Did you have any portion of that order in writing? A. Yes, sir.

Q. I hand you a letter dated January 4, 1916, and ask you whose signature that is?

A. That is Tay Bayers' signature.

Q. That is just preliminary. And I hand you a letter dated February 21, 1916, and ask you whose signature that is? A. Tay Bayers'.

Mr. KELLEY.—Just a minute—

Mr. FAULKNER.—We offer that in evidence first.

Judge WINN.—We object to the letter as being incompetent and immaterial, irrelevant, and not binding upon the plaintiff company in this case, and pertains to a certain kind of a contract or agreement, which under no circumstances would we be bound by under the testimony in this case so [102] far advanced.

Mr. FAULKNER.—That is simply preliminary.

Judge WINN.—And, of course, urging the same objection that it is not anything that is included in the bill of particulars that they are bound by and that they furnished when we demanded it.

The COURT.—I'm inclined to sustain the objection to that letter, because it is simply preliminary negotiations.

Mr. FAULKNER.—Well, the next letter is the one.

Judge WINN.—As I understand it, is counsel going to offer them as one exhibit?

Mr. FAULKNER.—It might be the best way.

(Testimony of J. C. McBride.)

Judge WINN.—In other words, it all pertains to the same matter.

Mr. FAULKNER.—Yes.

Judge WINN.—Then, we can get all the letters together and see whether the whole—

Mr. FAULKNER.—Well, I might, then, identify this one and then we'll have the whole thing.

Q. Whose signature is that?

A. That is Tay Bayers'.

Q. Letter of what date? A. March 6, 1916.

Judge WINN.—We urge an objection to each one of those letters separately and to the letters combined, on the ground that they are immaterial and irrelevant. They don't tend to prove any issues set forth in the pleadings, and pertain to matters that the defendant did not furnish us in any bill of particulars, which he furnished in this case, [103] and they are not such sales as, if they are legal and binding in any respect at all, under certain circumstances they would not be legal and binding upon the plaintiff company in this case so far as the evidence now stands, under the testimony that has been offered on the part of the defendant; and, of course, there is still the objection that it is remote, uncertain, prospective damages, if any damages accrued from it.

Mr. FAULKNER.—Of course, the whole transaction cannot be brought out in one question. I intend to follow it up by asking the witness further questions.

The COURT.—Well, so far as this is concerned, I will sustain the objection. It appears to me that

(Testimony of J. C. McBride.)

this is simply a contract to be entered into between Mr. Bayers and Mr. McBride, that Mr. Bayers acted as subagent for the property, not as a buyer under the contract such as claimed in your answer. There is no subagency allowed.

Mr. FAULKNER.—If the Court please, I don't like to argue the question after the Court has ruled on it, but I would like to call your attention to one thing, and that is, I claim that under this contract the Union Oil Company agreed to furnish the defendant with oil in sufficient quantity to meet the requirements of the trade. Now, we propose to show by these letters and the testimony that will follow, that this would have been a part of the trade. They were shut off from this portion of the trade by reason of not having been able to furnish any oil to Mr. Bayers at all. And I want to call the Court's attention to the last letter. Well, I may withdraw that and put that letter in later. I think I can show there that Mr. Bayers came in [104] specifically for a load of oil, but we would ask an exception to the Court's ruling and particularly to the Court's ruling as to the letter of February 21, 1916. The letters have all been identified. We'll offer them in evidence and ask an exception.

The COURT.—You do offer them in evidence?

Mr. FAULKNER.—I want to get it into the record.

Q. Now, Mr. McBride, did you sell any oil to Mr. Bayers? A. No, sir.

Q. Did he come to the Union Oil Company for any specific order of oil?

Judge WINN.—The same objection, if your Honor please, upon the ground that any purported sale that he says he was going to make to Mr. Bayers would not come under any contract that the defendant had with the plaintiff to furnish any oil. It is irrelevant and immaterial and it is not included within the bill of particulars filed in this case. It is remote, uncertain and prospective profits, for which no recovery could be had.

Mr. FAULKNER.—If the Court please, I would like to be heard a minute on that.

Judge WINN.—And comes within the statute of frauds.

Mr. FAULKNER.—Here is a contract for furnishing Mr. McBride with enough oil to meet his trade. Now, under that contract he was to make a settlement with the Union Oil Company for all the oil, and he was to be responsible for the sales. The testimony shows that they were to furnish him with sufficient oil to meet the trade, and he worked up a trade and was responsible for the oil that was sold. [105]

The COURT.—You can show where you sold oil, but not from a subagency.

Mr. FAULKNER.—I wouldn't consider this to be a subagency. It would be prospective sales. Of course, they didn't make any of these sales, because they didn't have the oil.

The COURT.—Suppose I was acting for the Clerk here and I have a lot of groceries and you came in to me and said, "Here, I can take these groceries out into the country and sell them."

(Testimony of J. C. McBride.)

Well; now, that isn't a sale. That is simply taking it out on a chance of sale. The commissions are on the sales that Mr. McBride would make, not on deliveries to a subagency.

Mr. FAULKNER.—So far as this question goes to this, this is a sale.

The COURT.—If you can show an order of purchase of property—

Mr. FAULKNER.—That is what this question is and it is objected to now.

Judge WINN.—Well, I might ask Mr. Faulkner if it isn't a fact that what he is going to question the witness about is concerning these letters, and so forth, that he tendered in evidence.

Mr. FAULKNER.—No.

Judge WINN.—It is not?

Mr. FAULKNER.—No.

Judge WINN.—Well, then,—I still object.

The COURT.—Repeat the question. (Following question repeated by the reporter.) “Did he come to the Union Oil Company for any specific order of oil”?

A. Yes, sir.

Q. In what year? [106] A. 1916.

Q. Do you remember how many drums he came for?

Judge WINN.—The same objection, if your Honor please.

The COURT.—Objection overruled.

Q. How many? A. Fifty drums.

Q. How many gallons would that be as a matter of computation?

(Testimony of J. C. McBride.)

Judge WINN.—The same objection, if your Honor please.

The COURT.—Objection overruled.

A. Well, it is—I can't figure that in my head. 5,250 gallons.

Q. That is of refined oil?

A. Refined oil; yes, sir.

Q. Now, Mr. McBride, you have stated that during the period from 1915 to 1916 you didn't get enough oil to supply your trade.

A. Yes, sir.

Q. Did you notify the Union Oil Company of that? A. Yes, sir.

Q. Did you notify the Union Oil Company of that? A. Yes, sir.

Q. Did you have any promises from them regarding—

Judge WINN.—Wait a minute. May I ask a preliminary question—whether it was in writing or oral.

The COURT.—I suppose he is going to follow this up. I believe it is simply preliminary.

Judge WINN.—Well, if he did give notice first, I would like to know whether it is in writing or oral.

The COURT.—This is preliminary. He may answer. Did you receive any answer? [107]

(Question repeated at request of the Court.)

Q. Did you have any promise from them regarding the future? A. Yes.

Judge WINN.—We make the same objection

(Testimony of J. C. McBride.)

and also ask that we have the privilege of asking whether such promise was in writing or oral.

Mr. FAULKNER.—Well, we'll show that.

Q. Now, Mr. McBride, in 1917— Oh, I might ask you this, during the years 1915 and 1916, did you maintain your equipment for the sale of these oils at all times? A. Yes, sir.

Q. Did you maintain a force to sell the oil?

Judge WINN.—Object to it.

Q. And everything that is necessary.

Judge WINN.—It is incompetent, irrelevant and immaterial, about any force. There is nothing alleged in the pleadings about any force.

Mr. FAULKNER.—I think perhaps it would be a question for the plaintiff to deny, to show otherwise by their evidence, but I think that we ought to be allowed to pursue it.

The COURT.—He may answer. Objection overruled.

A. Yes.

The COURT.—The word “facilities,” facilities for the delivery of the oil covers the word force.

Q. Did you maintain the equipment and facilities for the whole period.

Judge WINN.—The same objection.

A. Yes, sir.

The COURT.—Objection overruled. [108]

Q. Now, Mr. McBride, I will ask you if in 1917 you had any communications or correspondence with the Union Oil Company regarding this contract—early in 1917. Did you have any correspondence with them? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. Now, what was done with reference to a contract in 1917, in the early part of 1917, if anything?

A. We made a written contract in 1917.

Q. Now, where was that contract prepared?

A. The contract was prepared in Seattle.

Q. You remember when that was signed?

A. I think it was signed in the middle of the year.

Q. About the middle of the year. A. Yes, sir.

Q. And the contract was dated February 14, 1917? A. Yes, sir.

Q. Was that the correct date?

A. That was the—

Q. (Interrupting.) Was that the date when it was signed, or was it signed later?

A. It was signed later.

Q. Did the Union Oil Company send you that contract to Juneau? A. Yes, sir.

Q. And when you received it, did you have any communication from them regarding it?

A. Yes, sir.

Q. Did you read them? A. Yes, sir.

The COURT.—What is the purpose of this?

Mr. FAULKNER.—What is that? [109]

The COURT.—What is the purpose of this?

Mr. FAULKNER.—To show the interpretation of the contract; to show the letter of the Union Oil Company, interpreting particularly one clause in there, which might be of—

The COURT.—Wait a moment, now.

Judge WINN.—Of course, we can't object until we see the letter.

(Testimony of J. C. McBride.)

Q. I will ask you if that is the letter you wrote (handing letter to witness)? A. Yes, sir.

Mr. FAULKNER.—We'll offer it in evidence.

Judge WINN.—Did you offer this in evidence?

Mr. FAULKNER.—Yes.

Judge WINN.—We object, if your Honor please, to the introduction of this letter on the ground that it is a self-serving declaration, and it is incompetent, irrelevant and immaterial and not the best evidence. There has been no foundation laid for it. The terms and conditions of the 1917 contract were complete and perfect in their terms and it was signed by the respective parties—no fraud, mistake or anything alleged to attack the contract. Hence, if this is the contract that they are suing upon, which is admitted, this is absolutely immaterial, incompetent and irrelevant in the case and no foundation laid for the introduction of it.

Mr. FAULKNER.—If the Court please, there are several other things in those letters which, I think, are material, which the Court can readily see; no use of my stating—

Mr. KELLEY.—I would suggest that you offer the letter, [110] that you offer all the letters for identification, and then offer them in evidence all at once, if they all pertain to each other.

Mr. FAULKNER.—This (indicating) is an answer to that.

The COURT.—Well, then, this letter and the answer should be construed together.

Q. Did you receive any answer to the letter of March 21, 1917, which I have just handed to you?

(Testimony of J. C. McBride.)

A. Yes, sir.

Q. From the Union Oil Company? A. Yes, sir.

Q. I'll hand you another letter, Mr. McBride, and ask you if you have seen that before?

A. Yes, sir.

Q. Whose signature is on that letter?

A. Mr. Kelly's.

Q. Who is Mr. Kelly?

A. Mr. Kelly is the district sales manager for the Union Oil Company in Seattle.

Q. Where did you receive that?

A. Here at Juneau.

Q. From whom? A. The Union Oil Company.

Q. We'll offer the two in evidence.

Judge WINN.—Are you offering it, or do you—

Mr. FAULKNER.—We offer both of them.

Judge WINN.—We object. You mean together?

Mr. FAULKNER.—Yes, if that is more convenient. I don't want the Court to reject both of them if one is all right.

Mr. KELLEY.—May I ask the Court the date of that letter? [111]

The COURT.—March 21st.

Judge WINN.—We urge the same objection to this last letter which we just urged to the other letter, and object to each one separately and combined.

(Objection repeated at request of Court.)

Mr. FAULKNER.—On that objection, I would like to be heard particularly as to the last letter. The Court has read the letter and will note there are several clauses in that letter, interpreting the

clauses of the contract, which perhaps didn't need much interpretation, but there is one in particular to which I wish to call the Court's attention, which designates the territory.

Judge WINN.—I desire to object to counsel's stating what the letter contains until they offer it and it is received in evidence.

Mr. FAULKNER.—I'm not stating that.

The COURT.—Is your sole purpose of introducing this with reference to the negotiations leading up and preliminary to the entering of the contract of February 14, 1917? Or is it also to corroborate certain statements as to the price to be given for oil?

Mr. FAULKNER.—I don't think there is any contest on that. The prices I think are agreed upon. The purpose of the letter is to show the arrangement made between the two companies, interpreting the terms of the contract. There is one provision in the letter to the company from Mr. McBride that counsel might object to, under the ruling of the Court, and that is regarding the cost of the facilities, and I just want to tell the Court that I am not offering that [112] letter for the purpose of getting it before the jury. It has already been ruled on. Simply mentions the word "facilities."

Judge WINN.—Interprets two clauses of the contract, as to the meaning of the word "Juneau."

Mr. FAULKNER.—And it also shows when the contract was signed; that is, it shows it was signed after a certain date; not on February 14, 1917.

The COURT.—I think I'll overrule the objection under the conditions stated.

Mr. KELLEY.—Do I understand counsel to state that he is offering it for the purpose of defining what is meant by the word "Juneau"?

Mr. FAULKNER.—That is one purpose.

Mr. KELLEY.—Now, we will admit it for that purpose, that it defines what is meant by Juneau, but I would read just that paragraph,

Mr. FAULKNER.—No, that is not the only one.

Mr. KELLEY.—Then, what other purpose is there?

Mr. FAULKNER.—There is another paragraph here that I think is very material. I want to pick it out. And I want to offer that for the reason that the contract of 1915 and 1916 is denied by the plaintiff.

The COURT.—Yes.

Mr. KELLEY.—I don't think that the entire letter should be read, but simply those portions which pertain to the purposes that he has stated. In other words, there is the proposition that your Honor ruled on yesterday that shouldn't be raised at this time. [113]

The COURT.—Probably so. You can read those portions of the letter.

Mr. FAULKNER.—This is the letter of March 21, 1917—

Judge WINN.—Of course, to those respective portions, we make the same objections that we did

to the original letter. Now, we desire to suggest that if he is going to introduce the letter that he read only such portions as the Court has admitted. Now, I object even to the certain portions. The ruling before was on the entire letter. Now I simply object to these portions that he is going to read. They are not material.

(Following statement repeated by reporter at request of Mr. Kelley:)

“Mr. KELLEY.—Now, we will admit it for that purpose, that it defines what is meant by Juneau, but I would read just that paragraph.”

Mr. KELLEY.—We will admit that the construction of Juneau is as stated in this letter.

Judge WINN.—I think it is admitted in the pleadings.

The COURT.—No.

Mr. KELLEY.—We'll admit the construction that is placed in this letter on the definition of what is meant by Juneau in the contract as correct. In other words, we're not going to be bound by the city.

The COURT.—Objection overruled. He may read those portions.

Mr. FAULKNER.—The two portions of both letters.

The COURT.—What?

Mr. FAULKNER.—In the first letter of Mr. McBride he inquires about that.

Judge WINN.—That isn't material.

Mr. FAULKNER.—Oh, I don't think so either. I don't care to read that. I don't believe that's necessary. But in [114] this letter—I'll just show the Court what paragraphs I will read.

The COURT.—You're entitled to read those two. Nothing material in the other portions of the letter, except that portion as to the construction of the territory.

Mr. FAULKNER.—Now, there is another clause which refers to the former contract.

The COURT.—Yes, you can read that.

Mr. FAULKNER.—This is the letter of May the eighth, 1917, dated at Seattle, Wash. (Reads:)

“C. W. Young Co.,

“Juneau, Alaska.

“Attention Mr. McBride

“Gentlemen:

* * * * *

“In designating the territory as Juneau, we do so with the understanding that you are to receive commissions on all oils sold from Juneau stocks. We could not define the territory more definitely, for the reason, as you know, we make certain shipments from Seattle stocks on which you would be entitled to no commission.

“This agreement, as far as territory is concerned, is no change from agreement under which you have been acting. Any oil that you are able to sell and deliver from your Juneau stock, commissions will be paid you.”

And the last paragraph is this:

(Testimony of J. C. McBride.)

“In regard to clause No. 11, on the subject of compensation we are pleased to state that we have secured the permission of our head office to grant you a commission of 2 cents per gallon on lubricating oils and $1\frac{1}{2}\text{¢}$ per pound on grease. We hope that you will appreciate our efforts [115] in this connection, when we state that such commissions as we are allowing you as in this instance, are not allowed to any one else handling our oils. The commission of 1¢ per gallon on refined oil is the same as you have been receiving.”

Q. Now, Mr. McBride, I'll hand you another letter, dated June 12, 1917, and ask you if you have seen that before? A. Yes, sir.

Q. Where did you receive that? From whom did you receive it? A. Union Oil Company.

Q. Whose signature is that? A. Mr. Clagett's.

Q. Now, I will offer that letter in evidence. The only purpose of this is to show the date of the signing of the new contract. It isn't very material.

Judge WINN.—We make the same objection to this letter that we have made before.

The COURT.—Simply to show that the contract was signed?

Mr. FAULKNER.—If it is objected to, I will withdraw it. Did you make an objection?

Judge WINN.—The same objection as to the other.

Mr. FAULKNER.—All right; I'll withdraw it.

Q. Now, Mr. McBride, I will ask you to refer to your memorandum and I will ask you this question.

(Testimony of J. C. McBride.)

Did you maintain the same facilities for the sale of the oil during the year 1917 and up to August 24, 1918, that you had previous to that time?

A. Yes, sir.

Q. You had the same equipment, did you?

A. Yes, sir. [116]

Q. Did you have any designation on the buildings where the oil was stored? A. Yes, sir.

Judge WINN.—Object to it as immaterial.

Q. What did you have on the building? Don't answer this until they have had a chance to object.

A. I advertised on the roof that it was the Union Oil Company.

Q. Now, during the year 1917, did you have any orders for the sale of oils, or any business procured for oil that you could not furnish?

A. Yes, sir.

Q. Now, just refer to your memorandum and tell us what those items were. Have you got those?

A. I handed it back to you.

Q. I just wanted to have something to check up with. Now, will you give us those items?

Judge WINN.—Without repeating the objection, it goes to all this, because this runs over the same number of lists and corporations and individuals that he ran over for 1915 and 1916, with possibly one or two exceptions. We also urge the objection that the evidence is immaterial, irrelevant and incompetent and that there is no foundation laid for it. It does not tend to prove any issues in the case as set forth under the pleadings that we're trying

(Testimony of J. C. McBride.)

the case on. The damages sought to be recovered are remote and speculative and uncertain, and of such a nature that you cannot predicate a suit upon them. Another thing is that these orders come within the statute of frauds, because at the present time they have introduced a letter here which shows the different prices of oils, and so forth, which they [117] sold, and we urge that objection again. The agreement, if it is an agreement, comes within the statute of frauds and is not enforceable.

The COURT.—Objection overruled.

(Question repeated by reporter at request of Mr. Faulkner.)

Q. For the year 1917.

A. Hoonah Packing Company, Hoonah, in 1917, refined oil, 50,000 gallons, and lubricating oil for the same year, 2500 gallons; Hoonah Packing Company, Gambier Bay, 1917, refined oil, 40,000 gallons; for the same year lubricating oil, 2,000 gallons; Taku Canning & Cold Storage Company, 1917, 40,000 gallons of lubricating oil, of refined oil I mean, and for the same year, 2,000 gallons of lubricating oil; Chichagoff Mining Company, 1917, 25,000 gallons of refined oil, and lubricating oil for the same year, 1250 gallons; Auk Bay Salmon Canning Company, 1917, 30,000 gallons of refined oil and 1500 gallons of lubricating oil for 1917; National Independent Fisheries, 20,000 gallons refined oil in 1917, and 1,000 gallons of lubricating oil for the same year; Pacific American Fisheries Company 30,000 gallons of refined oil and 1500 gallons of

(Testimony of J. C. McBride.)

lubricating oil for the same year; James Davis, 1917, 15,000 gallons of refined oil and 750 gallons of lubricating oil; Hunter & Dickinson, 5,000 gallons of refined oil for 1917, as well as 250 gallons of lubricating oil; launch "Rolfe," 2,000 gallons of refined oil in 1917 and a hundred gallons of lubricating oils; launch "Tillacum," a thousand gallons of refined oil and fifty gallons of lubricating oil, in 1917—

You needn't mention the year. That's all for the same year. Tillacum was the last. Anita Phillips, 3,000 gallons of [118] refined oil, 150 gallons of lubricating oil; Pete Madsen, 2500 gallons of refined oil and 125 gallons of lubricating oil; launch "Morengen," 5,000 gallons—

Mr. KELLEY.—(Interrupting.) May it please your Honor, I want to call Mr. McBride's attention to the fact that he misread the amount of lubricating oil for Pete Madsen. I think you read it 150 and it is 125.

A. Yes; I evidently read the one above; 125. Launch "Morengen" 5,000 gallons of refined oil and 250 of lubricating; Gypsy, 200 gallons of refined oil and 10 gallons of lubricating oil; launch "Pacific," 5,000 gallons of refined oil and 250 gallons of lubricating oil; launch "Olga," 2,500 gallons of refined oil and 125 gallons of lubricating oil; launch "Orien," 4,000 gallons of refined oil and 200 gallons of lubricating oil; launch "El Nido," 1500 gallons of refined oil and 75 gallons of lubricating oil; launch "Chlopeck," 2500 gallons of refined oil

(Testimony of J. C. McBride.)

and 125 gallons of lubricating oil; launch "Caesar," 1500 gallons of refined oil and 75 gallons of lubricating oil; launch "Dolphin," 3500 gallons of refined oil and 175 gallons of lubricating oil; Pillar Bay Packing Company, 1650 gallons—

Mr. KELLEY.—Just a minute, may it please the Court. Now that was in 1916. That doesn't belong in 1917. The next for 1917 in this list is the Astoria & Puget Sound Canning Company.

A. That's right, that doesn't belong in 1917. Astoria & Puget Sound Canning Company, 30,000 gallons of refined oil and 1500 gallons of lubricating oil; George Naud, 8,000 gallons of refined oil and 400 gallons of lubricating oil; Valdez [119] Packing Company, 19,320 gallons of refined oil and 960 gallons of lubricating oil; Icy Straits Packing Company, 30,000 gallons of refined oil and 1500 gallons of lubricating oil.

Q. Did you have any order for the sale of oil to the launch Carita for the year 1917? A. Carita?

Q. Yes.

Mr. KELLEY.—He read that.

Mr. FAULKNER.—Did he?

Mr. KELLEY.—Yes.

Q. Have you any to the Scandinavian Grocery?

A. No, sir.

Q. You had nothing on there to the Scandinavian Grocery for 1917? A. No, sir.

Q. What does that total, for the refined oil?

A. 379,020 gallons.

Q. That is refined oil? A. That is refined oil.

(Testimony of J. C. McBride.)

Q. And what would be the commissions at one cent a gallon? A. It would be \$3790.20.

Q. And the lubricating oil, what would be the total amount of lubricating oil?

A. 18,951 gallons.

Q. What would be the commissions on that?

A. It would be two cents a gallon, \$379.02.

Q. And then the total of the two items, \$379.02 and \$3790.20 is what?

A. The total is \$4169.22. [120]

Q. \$4169.22. Did you make any of these sales mentioned? A. No, sir.

Q. Why?

Judge WINN.—The same objection, if your Honor please, that we made to the last question.

The COURT.—Objection overruled.

A. I didn't have the oil.

Q. Did you order the oil from the Union Oil Company? A. Yes, sir.

Q. Did you order the oil—

Judge WINN.—Wait; wait. May I ask a preliminary question, if your Honor please, as to whether it is in writing or oral?

The COURT.—Oh, yes.

Judge WINN.—Was your order in writing or oral?

The WITNESS.—Writing.

Judge WINN.—You have that writing, have you?

A. Yes, sir.

Judge WINN.—We object to the question, then, because it is not the best evidence.

(Testimony of J. C. McBride.)

The COURT.—Objection overruled. Simply a preliminary question.

Q. Mr. McBride, you said you ordered it from the Union Oil Company? A. Yes, sir.

Q. Did you order the oil mentioned last night in writing—

Judge WINN.—The same objection. It's not the best evidence. He has stated that these orders are not in writing.

Q. Did you order the oils mentioned in your testimony yesterday that you could have sold in 1915 and 1916 if you had them [121] on hand?

Judge WINN.—The same objection.

The COURT.—Objection overruled.

A. Yes, sir.

Q. From the Union Oil Company?

A. Yes, sir.

Q. Did you procure the oil from the Union Oil Company? A. No, sir.

Q. You have mentioned in your answer certain oil that could have been sold to the Astoria & Puget Sound Canning Company? A. Yes, sir.

Q. Did you have any correspondence from the Union Oil Company regarding this particular business with the Astoria & Puget Sound Canning Company at any time during the life of this contract or contracts? A. Yes, sir.

Q. I'll hand you a letter and ask you if you have seen that letter before. A. Yes, sir.

Q. Where did you receive that? From whom did you receive it?

(Testimony of J. C. McBride.)

A. From the Union Oil Company.

Q. Whose name is signed to that?

A. Clagett. Clagett was the district manager.

Q. We'll offer that letter in evidence.

Judge WINN.—Yes, we object to this letter, if your Honor please. It was written in 1916, 1915. There is nothing in the bill of particulars claiming any damages on any order from this particular company for that year.

Mr. FAULKNER.—That is true, your Honor.
[122]

Judge WINN.—And we urge the same objection to this that we urged to the other letter heretofore introduced, without repeating the objection.

Mr. FAULKNER.—Simply cumulative evidence on the failure of the Union Oil Company to furnish the oil, and cumulative evidence on the fact that they could have sold oil to this particular cannery.

Judge WINN.—And they haven't sued for it.

Mr. KELLEY.—That doesn't say anything about it.

Judge WINN.—And then the contract provides for these wholesale deals to be made with the canneries from the Seattle office as well, and there is nothing in the pleadings; no claim made in the bill of particulars; no claim for damages on this transaction made in the bill of particulars here.

Mr. FAULKNER.—Bearing on the question, on Mr. McBride's testimony on the question of getting orders.

The COURT.—I hardly think it is competent. This is the year 1915?

Mr. FAULKNER.—Yes; but it mentions the next year. This letter bears out the testimony of Mr. McBride. It tells him to go after that particular business. It simply corroborates his testimony to that extent. That is the only purpose for which it is offered.

The COURT.—Oh, it may be received and filed. Objection overruled.

Mr. FAULKNER.—I'll read this to the jury. (Reads:)

Defendant's Exhibit "B."

“Seattle, Wash., April 2, 1915.

“Personal.

“Attention Mr. McBride. [123]

“C. W. Young Co.,

“Juneau, Alaska.

“Gentlemen:

“In conversation with Mr. Dan Campbell to-day, of the Astoria & Puget Sound Canning Co., he states he gave the Standard Oil Co. his business this year for refined oils at their Alaska cannery, for the reason that the Standard was able to make deliveries from Juneau.

“I understand that our mutual friend, Mr. Bell, has the placing of these orders, and I believe if you get after him, Mr. Bell will see to it that you get a good share of this business. Do not understand me, however, to infer that this comes from Mr.

(Testimony of J. C. McBride.)

Campbell. Mr. Bell, I understand, is a good friend of yours. You can quote him 1/2¢ off refined oils in drums.

“Yours truly,
“GEO. D. CLAGETT,
B. M.,
“District Manager.”

(Whereupon foregoing letter was received in evidence and marked Defendant's Exhibit “B.”)

Q. Now, Mr. McBride, you have mentioned, in your testimony, certain oils that could have been sold to the Chichagoff Mining Company in the years 1916 and 1917, which was not delivered. Now, I will ask you if you had any correspondence from the Union Oil Company regarding this particular business? A. Yes, sir.

Q. I'll hand you a letter, dated May 17, 1915, and ask you from whom you received that.

A. From the Union Oil Company. [124]

Q. And who signed that?

A. George Clagett, District Manager.

Q. Did you receive that in Juneau?

A. Yes, sir.

Q. We'll offer that in evidence.

Judge WINN.—We urge the same objection to this letter, if your Honor please. You will notice that it is dated on May 17. The same objection that we made to the other letters. We don't want to burden the record by repeating it.

The COURT.—Is this one of the companies that they couldn't supply?

(Testimony of J. C. McBride.)

Mr. FAULKNER.—Yes.

The COURT.—Objection overruled.

(Whereupon letter mentioned was received in evidence and marked defendant's Exhibit "C.")

Mr. FAULKNER.—I'll read it. (Reads:)

Defendant's Exhibit "C."

Seattle, Wash., May 17, 1915.

C. W. Young Company,
Juneau, Alaska.

Gentlemen:

The Chichagoff Mining Company, at Chichagoff, Alaska, are going to use distillate for the operation of their launch, and we are informed they will require from 800 to 1000 gallons per week. The supply is to be taken from your stock at Juneau.

We wish to inquire if you have measuring tanks on the dock of sufficient size so that delivery can be made without much delay. Will you kindly let us know in regard to this at your convenience; and also arrange to see that the requirements for this boat are well taken care of.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA.

By GEO. D. CLAGETT,

JCC.

District Manager. [125]

Q. I'll hand you another letter, dated May 22, 1915, and ask you if you wrote that?

A. Yes, sir.

Mr. FAULKNER.—We'll offer this. We offer the whole letter but there is only one portion that is pertinent. If there is any objection to the remainder, I'll withdraw the first two paragraphs.

Judge WINN.—We object to it as incompetent, irrelevant and immaterial; no foundation laid for the introduction of the paragraphs which Mr. Faulkner seeks to introduce in this case and that it tends to prove, if it tends to prove anything, such damages as are speculative, uncertain, remote and as cannot be recovered in this case, and the statute of frauds applies to all these contracts, because the contracts are over \$500 in value—nothing to make it binding under the statute.

The COURT.—Objection overruled. It may be received.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "D.")

Mr. FAULKNER.—I'll only read the fourth paragraph. (Reads:)

Defendant's Exhibit "D."

May 22, 1915.

Union Oil Company,
Seattle, Wash.

Gentlemen:

* * * * *

We have had several talks with Mr. James Freeburn, superintendent of the Chichagoff Gold Mining Company, regarding his distillate supply and have made him several inducements relative to wharf-

(Testimony of J. C. McBride.)

age and so forth for his concentrates and supplies, which he might bring north and we are glad to see that we have secured this distillate contract, and if he uses about one thousand gallons per week, we will make arrangements whereby we will see that he is never short. [126]

* * * * *

Yours very truly,

C. W. YOUNG COMPANY.

Q. Now, Mr. McBride, I'll hand you another letter dated June 21st, 1915, and ask you from whom you received that.

A. Union Oil Company; George Clagett, manager.

Mr. FAULKNER.—I offer that in evidence for the same purpose.

Judge WINN.—We urge the same objection to this letter, if your Honor please, as to the others, and because the matters therein referred to are uncertain—throw no particular light upon the matters at issue in this case.

The COURT.—Oh, it may be received.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "E.")

Defendant's Exhibit "E."

Seattle, Wash., June 21, 1915.

C. W. Young Co.,

Juneau, Alaska.

(Attention Mr. McBride.)

Gentlemen:

In talking with Mr. Duncan this morning, of the

(Testimony of J. C. McBride.)

Chichagoff Mining Company, he stated that their new boat would be ready for distillate about July 8th, and that if our facilities at Juneau are as good as the Standard Oil Company's that we will get the business.

It will take about 2500 gallons of distillate per month, and the boat will call about every six days, taking 600 to 800 gallons at a time.

He will call on you in the near future relative to the lubricating oil requirements of this boat as well.

I am looking forward to being able to make a trip to Juneau sometime next month, at which time I hope Mr. Sclater, our Vice-President and General Manager will accompany me, just as soon as I can so arrange.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA,

GEO. D. CLAGETT,

District Manager. [127]

Q. Now, Mr. McBride, did you have any conversation with Mr. James Freeburn regarding—the superintendent of the Chichagoff Mining Company—regarding this oil contract with the Chichagoff Company? A. Yes.

Q. Were you able to furnish them with the oil?

A. No, sir.

Judge WINN.—The same objection we made to the others, as being speculative damages and coming under the statute of frauds; irrelevant and immaterial.

(Testimony of J. C. McBride.)

The COURT.—Objection overruled.

Judge WINN.—And the conversation would be hearsay.

Q. Mr. Freeburn promised you the business?

A. Yes, sir.

Judge WINN.—The same objection, if your Honor please.

The COURT.—Objection overruled.

Q. Now, I'll hand you another letter and ask you from whom you received that?

A. From F. O. Burckhardt of the Alaska-Pacific Fisheries.

Q. What date? A. May 27th, 1915.

Mr. FAULKNER.—I'll state to the Court that it is a letter outside of the bill of particulars, regarding the sale of oils not mentioned in the bill of particulars. It is simply preliminary.

Judge WINN.—I don't see that it is material for any purpose whatsoever under the ruling of the court.

The COURT.—Yes, I think—

Mr. FAULKNER.—Shows a demand for oil.
[128]

The COURT.—Simply an inquiry.

Mr. FAULKNER.—It shows a demand for the oil.

Judge WINN.—You offer it?

Mr. FAULKNER.—Yes, I offer it.

Judge WINN.—We make the same objection.

The COURT.—Objection sustained.

Mr. FAULKNER.—Very well.

(Testimony of J. C. McBride.)

The COURT.—Doesn't tend to prove anything.

Q. Mr. McBride, in making these orders, sending these orders to the Union Oil Company, how did you usually send your orders in what manner?

A. Mostly by cable.

Q. By telegram? A. Telegram or telegraph.

Q. And did you notify the Union Oil Company of these shortages from time to time as you required the oil?

Judge WINN.—Object to it as not the best evidence. If he notified them by telegram or writing, that is the best evidence.

The COURT.—Objection overruled. Simply preliminary. A. Yes, sir.

Q. Did you notify them? A. Yes, sir.

Q. Now, I'll hand you a telegram marked, or dated June 30, 1917, and ask you if you sent that telegram? A. Yes, sir.

Q. To whom?

A. To the Union Oil Company at Seattle, Wash.

Q. I offer that in evidence. [129]

Judge WINN.—We object to it as incompetent, irrelevant and immaterial, and no foundation laid for the introduction of it. It also doesn't come within any territory that was pretended to be claimed or allotted to Mr. McBride.

The COURT.—Objection overruled.

Mr. KELLEY.—Exception.

The COURT.—Exception allowed.

(Whereupon said telegram was received in evidence and marked Defendant's Exhibit "F.")

(Testimony of J. C. McBride.)

Mr. KELLEY.—I would like to know whether there are any other telegrams in connection with that very same thing.

Mr. FAULKNER.—Here (exhibiting) is one.

Mr. KELLEY.—Let's have them all. Let's have all of them that pertain to the same transaction.

Mr. FAULKNER.—That's all I think we have.

Mr. KELLEY.—We think all this ought to be introduced at once. Let's get it all before the jury at the same time.

The COURT.—Well, the first telegram has been admitted in evidence.

Q. You say you sent this to the Union Oil Company? A. Yes, sir.

Q. This Defendant's Exhibit "F"?

A. Yes, sir.

(Defendant's Exhibit "F" read by Mr. Faulkner, as follows:)

Defendant's Exhibit "F."

Juneau, Alaska, June 30, 1917.

Union Oil Company,

Seattle, Washington.

We have on hand one hundred eighty-four drums distillate. Does not include Valdez Packing Company purchase. Have order for one hundred fifty drums distillate for outside business, but do not want to let this go unless we are assured of immediate shipment, as we are again getting back local business due to supply on hand. Answer immediately. Important.

C. W. YOUNG CO. [130]

(Testimony of J. C. McBride.)

Q. Here are two telegrams, Mr. McBride, which I'll hand you, dated June 17 and June 23, 1917. No, I can't do that either. They're different telegrams. I hand you here a telegram dated June 17, 1917, and ask you if you received that?

A. Yes, sir.

Q. From where?

A. From Valdez; Valdez Packing Co.

Q. We offer that in evidence.

Judge WINN.—We object to this, your Honor, on the general grounds we have enumerated before. No issue raised in this case; remote and speculative.

Mr. FAULKNER.—Simply corroborates a portion of the testimony of Mr. McBride.

Judge WINN.—Not the best evidence and no foundation laid for it.

The COURT.—Objection overruled. It must be connected though.

Mr. FAULKNER.—Well, the testimony that has gone before shows that he had had this order. Simply corroborates it.

(Whereupon said telegram was received in evidence and marked Defendant's Exhibit "G," and afterward read by Mr. Faulkner, as follows:)

Defendant's Exhibit "G."

Valdez, Alaska, June 17, 1917.

Union Oil Co.,

Juneau, Alaska.

Our Seattle office advise us they placed order with you for thirty drums distillate. Please advise

(Testimony of J. C. McBride.)

us when you can ship as our supply is running very low and we need badly.

VALDEZ PACKING CO.

Q. I now hand you this telegram here, Mr. McBride. What is that? [131]

A. That is a telegram I sent to the Union Oil Company on June 23, 1917.

Q. The C. W. Young Company sent it?

A. Yes.

Judge WINN.—The same general objections and the same special objections that we made to these other letters and telegrams.

The COURT.—Objection overruled.

Mr. FAULKNER.—We offer it in evidence.

Judge WINN.—The same objection.

The COURT.—Objection overruled.

(Whereupon telegram mentioned was received in evidence and marked Defendant's Exhibit "H.")

Q. From where was this sent, Mr. McBride, this telegram, Defendant's Exhibit "H"?

Judge WINN.—The same objection.

A. From Juneau, Alaska.

The COURT.—Objection overruled.

Mr. FAULKNER.—I'll read it. (Reads:)

Defendant's Exhibit "H."

"June 23, 1917.

Union Oil Company,
Seattle, Washington.

Received order forty drums distillate day before yesterday from Valdez Packing Company and yes-

(Testimony of J. C. McBride.)

terday five drums gasoline. We expect to ship the distillate in a day or two unless you advise us to the contrary, but cannot ship the gasoline as we have but three drums on hand now. Steamer Portland was in day before yesterday and we expected the balance of our refined oil order on board, but none arrived. When can we expect it?

C. W. YOUNG COMPANY.”

Q. Now, Mr. McBride, I hand you a letter here and ask you from whom you received that?

A. I received that from the Union Oil Company at Seattle, signed by Mr. Clagett. [132]

Q. What date? A. May 22, 1915.

Q. I offer that—

Mr. KELLEY.—We make the same objections to this—same general objections and the same special objections.

Mr. FAULKNER.—This is regarding the shortages.

The COURT.—Objection overruled.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "I," and then read, as follows:

Defendant's Exhibit "I."

Seattle, Wash., May 22, 1915.

C. W. Young Company,
Juneau, Alaska.

Gentlemen:

We have your favor of the 12th, enclosing order for oils, which we are shipping you on the steamer Northnald leaving today.

(Testimony of J. C. McBride.)

We have been obliged to reduce your orders considerably, owing to the fact that we are very short of iron drums. We shipped out today all the drums we had on hand, and will make you another shipment at the earliest opportunity. In this connection we wish to request that you pay particular attention to the returning of empty drums. Send them to us at every opportunity, regardless of who is operating the boat, so long as we can get the \$2.00 rate. Do not hold them for the Borderline Transportation Co.

We have not been able to supply you with any of the small 55-gal. tanks, for the reason that we have none on hand.

The price of Oleum valve oil in fives, and in fact, all lubricating oils in fives, is 5¢ above the barrel price. We have not yet received the 15-gal. containers. We possibly will have some in the near future, and if you will send us your order, we will arrange to fill same.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA.

By C. M. COVIER(?) JCC.,
Special Agent. [133]

Q. I hand you another letter, Mr. McBride, dated June 15, 1915, and ask you from whom you received that?

A. Received that from the Union Oil Company; signed by Mr. Clagett.

The COURT.—What date was that?

The WITNESS.—June 15, 1915.

Mr. FAULKNER.—I offer that in evidence for the same purpose.

Judge WINN.—The same objection, if your Honor please. These letters don't connect up with anything that is in dispute, any issue under the pleadings in this case. These objections go to it and the other objections that we have urged heretofore. And not connected up with the bill of particulars sued on.

Mr. FAULKNER.—Simply for the purpose of showing that plaintiff had knowledge of the shortage.

Judge WINN.—You didn't sue for it. It's immaterial.

The COURT.—Objection overruled. It tends to support the defendant's allegations in his counterclaim.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "J," and then read by Mr. Faulkner, as follows:)

Defendant's Exhibit "J."

Seattle, Wash., June 15, 1915.

C. W. Young & Co.,
Juneau, Alaska.

Gentlemen:

We are in receipt of your favor of the 7th, to which you have attached an order for shipment to you on the S. S. Northland. We beg to advise that the steamer left last night with the majority of your order. We were obliged to cut out the order

for summer black, which we very much regret. We had an order in with the refinery for 175 bbls., of this commodity which we expected here last week, but for some reason or other it did not arrive. We are entirely out of this commodity. We will ship same, however, with next shipment, and do not anticipate any trouble in keeping you supplied with this or any other oil. [134]

We were obliged to cut your order for distillate to 70 drums and your order for gasoline to 30 drums, and eliminate entirely the distillate and gasoline orders in iron barrels. We were lucky to get this number back to you for the reason that the Northland did not discharge these drums at our dock until one o'clock on the day she departed. It was a question as to whether we could get drums filled in time to make the shipment. In addition to your order we had several orders for Alaska to go on the same boat, the drums for which arrived at the same time yours did. With regards to crude oil in barrels, we can supply you with this commodity which can be sold at 10¢ per gallon, Juneau.

We have not yet received a supply of 15-gallon containers. Just as soon as we do we will forward some to you. We have filled your order for lubricating oil and case oils complete, taking it for granted that you know the brand of these grades of oil and are not becoming overstocked on some oils that will not sell readily. Please send us your order

(Testimony of J. C. McBride.)

at the earliest opportunity covering next shipment on the next trip of the Northland.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA.

C. M. COVELL, JCC.,

Special Agent.

Q. Mr. McBride, I'll hand you a letter dated June 2, 1915, and ask you if that is a letter you wrote?

A. That's a letter I wrote to the Union Oil Company.

Q. On behalf of the C. W. Young Co.?

A. Yes, sir.

Mr. KELLEY.—We object, as incompetent, irrelevant and immaterial and no proper foundation laid—the same general objection and the same special objection.

The COURT.—Objection overruled. It may be received. I don't think the letter itself amounts to anything.

Mr. FAULKNER.—Simply notification or information as to the conditions.

Judge WINN.—We note an exception.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "K.") [135]

Q. From where was this letter written, Mr. McBride? A. Juneau, Alaska.

Mr. FAULKNER.—The letter is as follows:
(Reads:)

Defendant's Exhibit "K."

June 2, 1915.

Union Oil Company,
Seattle, Wash.

Gentlemen:

Yours of May 22d, 25th, 27th and 29th at hand and contents noted.

Since we have been emptying drums we haven't had any oil boats. When we first started we sold individuals a drum at a time which they drew from at their convenience, but since we have the tanks installed we have accumulated something like one hundred empty drums and these will be shipped on the Northland at the end of the week.

We hope that you will not make an allotment out of this shipment as we will be very short on refined oil before we can have these returned and we would like to have you save us as many more as you possibly can as we are going to use quite a few.

It certainly would be a great detriment to us to have a shortage of oil.

We secured the 1000 barrels of crude oil from the Taku Canning & Cold Storage Co. and notified the Borderline about the delivery; five hundred barrels about June 11th and the balance a little later.

Mr. Bradley, agent of the Standard Oil Co., notified me yesterday that there had been a reduction of $1/2\text{¢}$ on refined oil in bulk and 1¢ on case goods and we changed accordingly. This makes the price as they originally were.

(Testimony of J. C. McBride.)

We have been notified that distillate was selling at Sitka, Alaska, for 9¢. Have you any information on this?

Yours very truly,
C. W. YOUNG COMPANY,
Agents.

Q. Now, Mr. McBride, you state that most of your orders were sent by telegrams?

A. Yes, sir.

Q. And have you all those telegrams that were sent during all this period of three years now?

[136]

A. No; I haven't them all.

Q. Now, I'll hand you a telegram dated July sixth, 1915, and ask you if you sent that?

A. C. W. Young Company to the Union Oil Company; yes.

Mr. FAULKNER.—We'll offer that in evidence as preliminary to another question.

Judge WINN.—The same general objection and the same special objection; no proper foundation having been laid.

The COURT.—It may be received and filed and marked, subject to being connected up.

(Whereupon said telegram was received in evidence and marked Defendant's Exhibit "L.")

Q. From where was this telegram sent, Mr. McBride? A. From Juneau, Alaska.

Mr. FAULKNER.—The telegram is as follows:

(Testimony of J. C. McBride.)

Defendant's Exhibit "L."

July 6, 1915.

Union Oil Co.,
Seattle, Wash.

Ship Northland forty drums gasoline, hundred drums distillate, hundred cases gasoline.

C. W. YOUNG COMPANY.

Q. Now, did the Union Oil Company ship that order at that time?

Judge WINN.—The same objection, if your Honor please.

The COURT.—Objection overruled.

Q. Did you receive the oil? Was that order filled? A. No, sir.

Q. I hand you a letter dated August 11, 1915, and ask from whom you received that?

A. From the Union Oil Company at Seattle, Wash.

Q. Whose signature is that?

A. I can't make out that signature. [137]

Mr. FAULKNER.—We'll offer that in evidence.

Judge WINN.—The same general objection and the same special objection; especially also your Honor, that that isn't a matter that is sued upon in the case.

The COURT.—Objection overruled.

(Received in evidence and marked Defendant's Exhibit "M.")

(Letter read by Mr. Faulkner as follows:)

(Testimony of J. C. McBride.)

Defendant's Exhibit "M."

Seattle, Wash., August 11, 1915.

C. W. Young Company,
Juneau, Alaska.

Gentlemen:

We were obliged to reduce your last order on the s. s. Northland, account not having a sufficient number of drums.

It is only a question of a short time now until we have plenty of containers and will be able to ship your orders complete, as requested. We trust that you will continue to cooperate with us in the matter, and return the empty to us at the earliest opportunity.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA.

By C. M. COVELL, JCC.,

Special Agent.

Q. Now, I'll hand you a telegram dated Juneau, August 25, 1916, and ask you who sent that?

A. C. W. Young Company sent it to the Union Oil Company at Seattle.

Mr. FAULKNER.—We offer it in evidence.

Judge WINN.—The same general and the same special objection; no proper foundation having been laid.

The COURT.—Objection overruled.

(Whereupon said telegram was received in evidence and marked Defendant's Exhibit "N," and then read by Mr. Faulkner as follows:)

(Testimony of J. C. McBride.)

Defendant's Exhibit "N."

Juneau, Alaska, Aug. 25, 1916.

[138]

Union Oil Company of Calif.

Seattle, Washington.

Wire when we may expect shipment of oil.

C. W. YOUNG COMPANY.

Q. Here is another letter, Mr. McBride, and I'll ask you when you received that and from whom?

A. Received that from the Union Oil Company here.

Mr. FAULKNER.—We offer that in evidence.

Judge WINN.—The same general and special objections.

The COURT.—Objection overruled.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "O," and then read by Mr. Faulkner, as follows:)

Defendant's Exhibit "O."

"Seattle, Sept. 26, 1916.

C. W. Young & Co.,

Juneau, Alaska.

Answering letter, subject, Chichagoff Mining Co.,
Tacoma, Wash.

Dear Sir:

We are endeavoring to keep you permanently supplied with distillate at Juneau and do not anticipate your running short in the future. However, in case a shortage should occur through no fault of

(Testimony of J. C. McBride.)

ours, would like to have you give Chichagoff people preference on delivery, if you do not object. They have renewed contract with us and are dependent upon us for their supplies at that point.

Yours very truly,

V. H. KELLY, E. A.,

District Sales Manager.

Mr. FAULKNER.—I think that's all under that heading.

Adjournment taken until Monday, January 22, 1923, at 10 o'clock A. M.

Monday, January 22, A. D. 1923.

Court met pursuant to adjournment at 10 o'clock A. M.

J. C. McBRIDE, on witness-stand.

Direct Examination by Mr. FAULKNER (Resumed). [139]

Q. I think I asked you the other day, Saturday, but I want to make sure, did you notify the Union Oil Company about these orders which you had and couldn't fill? A. Yes, sir.

Q. Now, did you go to Seattle to see them about it? A. Yes, sir.

Q. When was the first time you went—

Judge WINN.—What was that question?

Q. When did you go to Seattle to see the Union Oil Company about these shortages?

A. It was in October, 1915.

Q. Did you, at that time, take the matter up with the company? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. With whom? A. Mr. Clagett.

Q. Now, during the years 1915, 1916 and 1917, you have given a list of orders that you received for oil which you couldn't fill. Now, were those orders from the ordinary trade, or was there anything extraordinary about them?

Judge WINN.—I object, if your Honor please, on the ground that it calls for a conclusion and an interpretation of the contract itself. Now, the written contract and the oral contract, as they contend it, is before the Court. Now, then, what orders were taken under it are absolutely matters for interpretation of the contract; and we further object to it as irrelevant and immaterial and speculative, uncertain, and because it comes within the statute of frauds.

Mr. FAULKNER.—I simply want to show that these orders were not extraordinary.

The COURT.—I think the question is objectionable. [140]

Mr. FAULKNER.—I might ask it in another way; I might ask about the conditions at the time. I will withdraw that question.

Q. Mr. McBride, you have given us a list of certain canneries and consumers of gasoline that would give orders to you during the years 1915, 1916 and 1917. Were those canneries operating during all those years? A. Yes, sir.

Q. Were they operating in 1914? A. Yes, sir.

Q. Were these gas boat owners and other con-

(Testimony of J. C. McBride.)

sumers of gasoline whose names you have given, operating here during that time? A. Yes, sir.

Judge WINN.—Object to 1914—irrelevant and immaterial under the issues in this case.

The COURT.—Objection overruled.

Q. And in 1915, 1916 and 1917? A. Yes, sir.

Q. Now, you say here, Mr. McBride, that you had a good deal of correspondence with the Union Oil Company regarding these matters?

A. Yes, sir.

Q. Have you all that correspondence now?

A. No; I haven't.

Q. Have you all the files that were made during all those years? A. No, sir.

Q. I think you stated Saturday that you had a memorandum from which you could check up some of these items on the bill of particulars. I will ask you if, since you were on the [141] stand Saturday, you found any particular written order for gasoline, refined oil?

A. Yes, sir.

Q. In your files. A. Yes.

Q. I'll hand you that and ask you where you got that?

A. In some of the papers that I have.

Mr. FAULKNER.—We'll offer that in evidence.

Judge WINN.—The same objection, if your Honor please, to this that we have urged to the other exhibits offered in this case; and because the contract of 1915–1916, if such a contract existed,

(Testimony of J. C. McBride.)

would be governed by the contents and not any oral testimony.

The COURT.—Objection overruled.

(Whereupon a form of memorandum of agreement, consisting of one sheet, ordering and agreeing to take certain quantities of oil and grease from the Union Oil Company, dated at Juneau, Alaska, Jan. 14, 1916, and signed by the Scandinavian Grocery, was received in evidence and marked Defendant's Exhibit "P.")

Mr. FAULKNER.—I'll hand it to the jury.

Q. Now, you mentioned in your testimony Saturday orders from the Pillar Bay Packing Company, Tenakee Fisheries Company and the Northwestern Fisheries Company. Did you notify the Union Oil Company specifically of those orders that could not be filled? A. Yes, sir.

Q. I'll hand you that letter and ask you if you wrote that.

The COURT.—Is that the original letter?

Mr. FAULKNER.—No, sir.

The COURT.—You better show it to counsel.
[142]

Mr. FAULKNER.—They have the original of that. Of course, that was written to the Union Oil Company and this is simply a copy of it.

Judge WINN.—We make the same objection, if your Honor please, to this; and that it doesn't come within the issues under the pleadings. Your Honor will observe that under the pleadings in this case, there is nothing that would justify the evi-

(Testimony of J. C. McBride.)

dence and testimony that they are now trying to introduce.

The COURT.—Objection overruled. You may read it.

Mr. KELLEY.—We save an exception.

The COURT.—Yes.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "Q.")

Judge WINN.—The same objection that I made to the other papers; no proper foundation having been laid.

Q. Where was this written from?

A. Written from Juneau in 1916.

(Letter read to the jury by Mr. Faulkner as follows:)

Defendant's Exhibit "Q."

July 25, 1916.

The Union Oil Company of California,
Seattle, Wash.

Gentlemen:

In the past week we have had the following orders:

Pillar Bay Canning Co., 15 drums of distillate.

Tenakee Fisheries, 30 drums of distillate.

Northwestern Fisheries Co. of Dundas Bay, 30 drums of distillate, which we could not fill.

We, of course, have some few drums of distillate on hand, but we could not let these go as it would run the Chichagoff Mining Co. short and also our local trade.

Yours very truly,

C. W. YOUNG CO. [143]

(Testimony of J. C. McBride.)

Q. Now, you mentioned another one, George Naud. I will ask you if you had any correspondence with the Union Oil Company regarding that particular order? A. Yes, sir.

Q. Did you write them a letter? A. Yes, sir.

Q. Did you receive an answer to your letter?

A. Yes, sir.

Q. I will ask you if that is the letter and the reply (handing letters to witness)? A. Yes, sir.

Mr. FAULKNER.—We'll offer those as an exhibit.

Judge WINN.—The same objection, if your Honor please, that we made to those other exhibits and letters that were offered in evidence, of like kind; and further, there is nothing in the pleadings that would justify this class of testimony; nothing to show that any demand was ever made on the company and nothing in the pleadings to indicate that.

The COURT.—Objection overruled.

Mr. KELLEY.—We save an exception.

(Whereupon said two letters were received as one exhibit and marked Defendant's Exhibit "R.")

The COURT.—That was included in the bill of particulars?

Mr. FAULKNER.—Yes. These two can go together. The letters are as follows:

Defendant's Exhibit "R."

June 13, 1917.

Union Oil Co. of California,
Seattle, Washington.

Gentlemen:

George Naud is a fish buyer from Taku River, [144] south of here, about twenty-five miles, and does more or less selling to the fishermen. He informed us today that in buying distillate and naphtha through the Taku cannery who make their purchases from the Standard Oil Co., he could get 1/2¢ off. Mr. Naud is willing to give us the business if we can meet this 1/2¢ rebate. He will use approximately 3,000 gallons of distillate and and 5,000 gallons of naphtha.

Hoping you will give us authority to make this price, we remain,

Yours very truly,

C. W. YOUNG COMPANY.

Seattle, Wash., June 20, 1917.

C. W. Young Company,
Juneau, Alaska.

Gentlemen:

It will be satisfactory for you to extend Mr. Naud 1/2¢ gallon off the market price on daily delivery on distillate and naphtha, at least for the present.

We do not wish to take on business of this kind and are inclined to confine our sales of distillate,

(Testimony of J. C. McBride.)

naphtha and gasoline to such customers as purchase their lubricating oils from us also.

Yours very truly,

V. H. KELLY,

EA.,

District Sales Manager.

Q. You mentioned another one from the Icy Straits Packing Company, Mr. McBride. Did you write the Union Oil Company about that?

A. Yes, sir.

Q. I hand you a letter dated April 7, 1917, and ask you if that is the letter you wrote?

A. Yes, sir.

Q. We'll offer that in evidence.

Judge WINN.—We make the same objection to this, if your Honor please, as not the best evidence; no foundation laid for the introduction of it. [145]

The COURT.—Well, I don't know that it is the best evidence. You may make a demand for the original. Do you object to it for that reason?

Judge WINN.—Yes, sir; and then the objections that I have been, of course, urging to all these letters and orders, without repeating them and encumbering the record. They don't come within the issues of the case, prospective and speculative, and barred by the statute of frauds.

Mr. FAULKNER.—Of course, I could make a demand upon him. I presume that the demand would have to be in writing.

The COURT.—No.

Mr. FAULKNER.—Well, now, we'll demand the original of the plaintiff. The letter is dated April 7, 1917, and is from the C. W. Young Company to the Union Oil Company; also letters of July 22, 1916, from the C. W. Young Company to the Union Oil Company.

Judge WINN.—Well, the situation is this, if your Honor please. The Union Oil Company and its records of that transaction, as shown by the correspondence, is in Seattle, Washington. There is nothing within the pleadings or the issues raised under the pleadings to indicate that the Union Oil Company deemed any such correspondence was necessary at all; nothing in the pleadings at all to show that they ever made any demand or requests for additional oil to fulfill certain contracts that they had here, and now they demand that we produce the original of two letters. Seattle is distant from here, which the Court will take judicial notice of, and we have no such correspondence here and didn't bring it for the reason that I have just stated. If there is going to be any demand made under [146] the issues of the case, the demand should have been made in time to allow us to produce the originals here for the purpose of whatever counsel may have intended to use them for.

Mr. FAULKNER.—There is an allegation of violation of the contract; that they didn't keep the defendant supplied with sufficient oil for the trade.

The COURT.—Not being able to furnish the original, you are allowed to introduce the copy.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "S.")

Judge WINN.—Well, if it is necessary to prove all the facts that I stated as true, I'll have Mr. Trew here file an affidavit that the assertions that I am making to the Court are absolutely the facts.

The COURT.—The Court has its idea of trying this case. You may be trying it with a different view of the law from what the Court is. The Court takes a different view of the pleadings from what you have stated here, and the Court is not in agreement with you. If the Court is in error, the Court has been in error all through this case. When you state such things as this are not within the pleadings, the Court has already decided that they are within the pleadings and it is your duty to be prepared to meet any possible theory of the case that might come up under the pleadings.

Judge WINN.—Well, have you ruled on the pleadings?

The COURT.—Yes.

Judge WINN.—If there is any doubt about my word that we didn't have them— [147]

The COURT.—Oh, no. Simply a difference between the plaintiff's view of the pleadings and my view of the pleadings.

Judge WINN.—Well, if it is based on that—

The COURT.—Yes.

Judge WINN.—We take an exception to the ruling of the Court.

(Defendant's Exhibit "S" read by Mr. Faulkner, as follows:)

(Testimony of J. C. McBride.)

Defendant's Exhibit "S."

April 7, 1917.

Union Oil Company of California,
Seattle, Washington.

Gentlemen:

The Icy Straits Packing Co., practically a local concern, are driving six fishtraps or better, in in preparatory to the coming fishing season. They will have in operation two gasoline launches for the delivery of their fish and will be in the market probably for 20,000 to 30,000 gallons of refined oil, and no doubt will shortly ask us to give them a price on same. Therefore, will you kindly let us know as soon as possible what we can quote them from the market price.

If their expectations to not fail they will be a very large fishing concern in southeastern Alaska as they are contemplating for 1918 the construction of a cannery and cold-storage plant in Icy Straits, which is between here and Sitka. This year they are merely prospecting with their traps to ascertain the size cannery they should build.

Yours very truly,

C. W. YOUNG COMPANY.

Q. Now, we make the same demand on the plaintiff for the original letter of June 7, 1916, from the C. W. Young Company to the Union Oil Company.

Judge WINN.—We make the same answer to this demand that we made to the other, without

(Testimony of J. C. McBride.)

repeating it and encumbering the record in the case.

The COURT.—The same objection?

Judge WINN.—The same objection; yes, sir.
[148]

The COURT.—The same answer to the demand?

Mr. KELLEY.—Yes.

The COURT.—Objection overruled.

Judge WINN.—Allow us an exception to the ruling.

Mr. FAULKNER.—That is not any specific order, but the letter is about the shortage. One paragraph of it, I don't think is material.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "T.")

Q. That letter was sent by you, Mr. McBride?

A. Yes, sir.

Q. To the Union Oil Company.

(Letter read by Mr. Faulkner, as follows:)

Defendant's Exhibit "T."

June 7, 1915.

Union Oil Company,

Seattle, Wash.

Gentlemen:

On S. S. Northland, sailing from here yesterday morning we shipped you 107 empty drums, nine of which, as per list enclosed, are from the Alaska Gastineau Mining Company and the balance, 98, list of which is herewith, are from us.

The three drums of Water White oil which we received on this Northland, their number and gallons are as follows:

No. 16304, gallons, 109
No. 0776 gallons, 103.
No. 1435 gallons, 104.

Enclosed herewith you will find our order which kindly return on this trip of the Northland.

No doubt you will have ample drums for this order as we understand that there is quite a few to be shipped you from Ketchikan.

It is very necessary that the distillate and gasoline order is filled for this trip of the Northland, as we will be short both products if we do not receive them. [149]

The cannery season is just opening up and we are soliciting their business and have some very encouraging promises and from the way the refined and lubricating business has opened up for us we feel that we are positive of our share, and a shortage would spell disaster just at the present time since we have begged their business and we have made a thorough campaign of advertising.

We had an order last week for six barrels of summer black and we could only give them one barrel and in today's order we have included 10 barrels of summer black with the hopes of catching another shortage. The writer believes there are two or three barrels used per day of this grade of oil here on the channel and we feel that if we could get a better price on this oil that we could sell quite a few barrels of it which would mean a

(Testimony of J. C. McBride.)

wedge for more business. Kindly see if you cannot figure out a better price.

We have had two or three inquiries for crude oil in barrels, will you kindly give us price on same delivered here.

We have again ordered galvanized tanks and hope this time you will be able to send us same as they are the proper containers for outside business, and if you have any fifteen gallon containers, send us some of these. We have noticed that all our orders have been cut down and we hope you will not do this with the one enclosed, as we feel that our judgment must be relied upon at this station.

Yours very truly,

C. W. YOUNG COMPANY.

Mr. FAULKNER.—Now, I will demand from the plaintiff the original letter of July 22, 1916, from the C. W. Young Company to the Union Oil Company.

Mr. KELLEY.—The same answer as heretofore stated.

Judge WINN.—The same answer so far as the production of the paper is concerned.

The COURT.—The plaintiff says he cannot produce the original of which this is a copy?

Judge WINN.—Yes; for the same reasons I stated before.

Mr. FAULKNER.—We now offer it. First, I want to identify it.

Q. I will ask you if you can identify it.

(Testimony of J. C. McBride.)

The COURT.—Ask him if he mailed it. [150]

Q. Did you mail the original of that to the address of the Union Oil Company? A. Yes.

Q. When? A. July 22, 1916.

Q. From where? A. Juneau, Alaska.

Mr. FAULKNER.—We now offer it in evidence.

Judge WINN.—The same objection that we have made, if your Honor please; to all these letters and correspondence that has been offered in evidence, without repeating it and encumbering the record with our objections.

The COURT.—Objection overruled.

(Whereupon said copy of letter was received in evidence and marked Defendant's Exhibit "U.")

Mr. FAULKNER.—The letter is as follows:

Defendant's Exhibit "U."

“July 22, 1916.

The Union Oil Company of California,
Seattle, Wash.

Gentlemen:

We returned to you last week on steamer Curacao 144 empty drums, and to-day on S. S. Revilla we are forwarding you 20 drums.

We had a letter from Mr. Hanlon saying that the Wakena would not leave until probably August fifth, and we hope that by this time that we may be able to get a substantial shipment from you, both in refined and lubricating oils.

We wired you a few days ago that we would stand the difference between the old and present freight rate on a few drums of the oil. It would

(Testimony of J. C. McBride.)

not be policy to run out of refined oil and lose all of our trade, and for this reason we are willing to make a sacrifice on a small shipment until we can have a substantial shipment on the Wakena. However, we do not feel that it is up to us to even do this, because, as the writer has already said, if we have [151] not refined oil and our customers go to our competitors, it is a hard proposition to gain these customers back.

Yours very truly,

C. W. YOUNG COMPANY,

By _____.

Q. Now, I hand you a letter dated November 20th, and ask you if you have seen that?

A. Yes, sir.

Q. Where did you get that?

A. Received it here.

Q. From whom? A. Union Oil Company.

Q. Signed by whom?

A. Mr. V. H. Kelly, district sales manager.

Mr. FAULKNER.—We now offer that in evidence.

Q. Is that letter just exactly as you received it?

A. Yes, sir.

Q. And the writing on the bottom was on there when you received it? A. Yes, sir.

Judge WINN.—The same objection we made to the other letters without a repetition of the objection.

The COURT.—Objection overruled.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "V," and then read by Mr. Faulkner, as follows:)

Defendant's Exhibit "V."

Union Oil Company of California,
November 20, 1916.

Chichagoff Mining Company,
Tacoma, Wash.

Attention: G. W. Duncan, Purchasing Agent.

Dear Sir: [152]

We are in receipt of your favor of November 18, which is notice of cancellation of our contract with you, and trust that you will find our Juneau deliveries more dependable and that we may have the pleasure of serving you in the future. We make full acknowledgment of the fact that our stock and service at Juneau has not been satisfactory during the past months, but ample supplies are now available and care is given to affording customers satisfactory service and products.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA.

V. H. KELLY,
District Sales Manager.

And on the bottom of the letter:

C. W. Young & Co.,
Juneau, Alaska,

The mine office at Chichagoff have complained to their Tacoma office and while Mr. Duncan wishes to favor us with the distillate business at Juneau,

(Testimony of J. C. McBride.)

he does not feel inclined to do so, unless his mine office writes him that services is improved.

Q. Now, I hand you another letter, Mr. McBride, and ask you from whom you received that?

A. I received this from the Union Oil Company; signed by V. H. Kelly, District Sales Manager.

Q. From where? From Seattle?

A. From Seattle.

Q. I now offer that in evidence.

Judge WINN.—The same objection, if your Honor please, and particularly that it does not come within the issues of the pleadings, and I wish to call your Honor's attention to the date of that letter in 1917. The others have all been prior to 1917.

The COURT—Yes; I understand that.

Judge WINN.—And there is no foundation laid for it.

Mr. FAULKNER.—There is one line in that letter that is important that I want in. [153]

The COURT.—Certainly. The date is prior to the signing of the written contract; you'll notice that. The written contract was signed February 14, 1917, and this letter was dated February 2, 1917.

Mr. FAULKNER.—But this is while the oral contract was in performance.

The COURT.—While the oral contract was in performance?

Mr. FAULKNER.—Yes.

The COURT.—Objection overruled.

(Whereupon letter was received in evidence and marked Defendant's Exhibit "W," and then read to the jury, as follows:)

Defendant's Exhibit "W."

Seattle, Wash., Feb. 21, 1917.

C. W. Young & Co.,
Juneau, Alaska.

Answering letter 2/9/17.

Subject: Washington Bay Packing Co.

Dear sir:

Replying to your favor of the ninth instant, regret to advise that we will not be able to consider establishing an agency at Washington Bay this year, as the equipment available makes it impossible. Whatever of this business you are able to take care of at the regular prices, you should look after, providing the drums can be returned promptly. It is our desire to keep you well supplied this year and not have any of the shortages that handicapped us last year. We could not enter into any plan to put in a stock at any additional point in southeastern Alaska.

Yours very truly,

V. H. KELLY,

District Sales Manager.

Mr. FAULKNER.—I will now ask the plaintiff for the original telegram, dated August 10, 1916, from the C. W. Young Company.

Mr. KELLEY.—We make the same reply that we have heretofore made. [154]

(Testimony of J. C. McBride.)

Judge WINN.—I don't know whether any such telegram was ever received by us or not.

Q. Mr. McBride, I hand you a telegram dated August 10, 1916, and ask you if you sent that?

A. Yes, sir.

Q. From the C. W. Young Co.?

A. The C. W. Young Company sent it to the Union Oil Company at Seattle.

Q. On the date that is given on there?

A. Yes, sir.

Q. I now offer that telegram.

Mr. KELLEY.—We make the same objection.

The COURT.—Objection overruled.

(Whereupon said telegram was received in evidence and marked Defendant's Exhibit "X.")

(Telegram read by Mr. Faulkner, as follows:)

Defendant's Exhibit "X."

Juneau, Alaska, Aug. 10, 1916.

Union Oil Co. of California,

Seattle, Wash.

Must have oil immediately shipment just received will last until Sunday. Wire when we can expect shipment as we are turning down business every day.

C. W. YOUNG CO.

Q. I'll hand you another telegram, dated July 2, 1917, and ask you from whom you received that?

A. Received that from D. H. Kelley of the Union Oil Company at Seattle.

(Testimony of J. C. McBride.)

Q. (Mr. FAULKNER.) We'll offer that in evidence.

Judge WINN.—The same objection, if your Honor please. That is dated February 7, 1917.
[155]

Mr. FAULKNER.—July 2.

Judge WINN.—July 2, the written contract was not in existence or in force and effect. No fault of ours that it wasn't signed sooner.

Mr. FAULKNER.—If the Court please, there is another notation on the back of it, and for that reason I would like permission to read the telegram, or else erase that. That is, I don't object to its going in if the other side doesn't.

Judge WINN.—I didn't notice that. It relates to no part of the telegram.

The COURT.—It better be eliminated.

Mr. FAULKNER.—Yes. Does the Court overrule the objection?

The COURT.—Yes; I overrule the objection.

(Whereupon said telegram was received and marked Defendant's Exhibit "Y," and then read as follows:)

Defendant's Exhibit "Y."

Seattle, Jul. 2, 1917.

C. W. Young Co.,

Juneau,

No immediate shipment available. Better conserve for local business.

V. H. KELLY.

Q. Now, Mr. McBride—don't answer this ques-

(Testimony of J. C. McBride.)

tion if it is objected to until the Court rules on it—at the time you received this telegram, did you have any other order for oil that is not mentioned in the bill of particulars, which you could not fill?

Judge WINN.—Hold on; that is too indefinite and uncertain.

Mr. FAULKNER.—No—

Judge WINN.—And it is not shown whether it is in the bill of particulars. Then he hands him this telegram. Now, if Mr. McBride remembers anything about it, if it is material [156] or relevant or competent under the pleadings and the objections that I have made, why his memory is better than his memorandum, which may be for some self-serving purpose. We don't know anything about the memorandum.

Mr. FAULKNER.—He can't keep all these various matters in his head.

The COURT.—First ask him if he remembers.

Mr. FAULKNER.—I did.

The COURT.—If he does not remember.

Q. Do you remember, Mr. McBride, if you had any order at that time for oil which is not set forth in the bill of particulars? A. Yes, sir.

Q. Now, I will ask you from whom was that order.

Judge WINN.—We urge the same objection; particularly the objection heretofore made that no evidence can be produced in this case except on the items set forth in the bill of particulars. He is

(Testimony of J. C. McBride.)

bound by the bill of particulars under the record and evidence and under the law.

Mr. FAULKNER.—The offer is made for the purpose of showing the general conditions stated; that there was—

The COURT.—(Interrupting.) Objection overruled.

Q. From whom was that?

A. The Deep Sea Salmon Canning Company; Mr. August Buschmann, manager.

Q. Where?

A. At their cannery in Icy Straits.

Q. And at that time could you fill that order?

A. No, sir.

Judge WINN.—The same objection. [157]

The COURT.—Objection overruled.

Q. Why didn't you fill it?

Judge WINN.—The same objection.

A. I was short of oil.

Q. Now, perhaps this question will be objected to. I don't know that it is very material. Don't answer it until the Court rules on it. Did you notify Mr. Buschmann to that effect?

Judge WINN.—What is that question?

Q. Did you notify Mr. Buschmann to that effect that you had no oil?

Judge WINN.—That is immaterial.

The COURT.—I think so.

Q. Now, I hand you a letter dated July 27, 1917, and ask you from whom you received that?

Judge WINN.—What date?

(Testimony of J. C. McBride.)

A. July 27, 1917. Received it from the Union Oil Company, Mr. Clagett, as district sales manager.

Mr. FAULKNER.—I offer that in evidence.

Judge WINN.—There are certain numbers and figures or memoranda on this that we would urge a special objection to.

Mr. FAULKNER.—We will take it off.

Judge WINN.—We make the same objection to the introduction of this letter.

The COURT.—Objection overruled.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "Z," and then read as follows:)

Defendant's Exhibit "Z."

Seattle, Wash., July 27, 1917.

C. W. Young & Co.,
Juneau, Alaska,
Gentlemen: [158]

We were anticipating sending you a shipment of various oils on this trip of the S. S. Portland, but on account of the condition of our stocks at Seattle, we are unable to make shipment at the present time.

We note that your supply of gasoline is quite low, and we trust that on the next trip of the Portland, we will be able to ship you what oils you may need. Would suggest that in the meantime you let us have an order of what you want.

Yours truly,

GEO. D. CLAGETT,
District Manager.

(Testimony of J. C. McBride.)

Judge WINN.—We urge the same objection, if your Honor please, to this letter, along the same line, the same as to the rest of them.

Q. Mr. McBride, I will ask you where did you receive that letter?

A. I received it here at Juneau.

Q. From whom?

A. Union Oil Company, Mr. Clagett.

Q. Through the mails? A. Through the mails.

Q. We now offer it in evidence.

Judge WINN.—The same objection unless there is some explanation made. There is a memorandum there in pencil that is not a portion of the letter evidently.

Mr. FAULKNER.—Well, I'm offering to put the letter in evidence, read the letter, then have it—if the Court thinks we can't put this pencil memorandum in, it could be erased by the Clerk very easily.

The COURT.—You can read the letter without the pencil memorandum. [159]

(Letter thereupon read to the jury by Mr. Faulkner as follows:)

Defendant's Exhibit "A-1."

Seattle, Wash., March 24, 1915.

C. W. Young Company,
Juneau, Alaska.

Gentlemen:

We have your favor of the 18th instant, attaching order for oils to be shipped you on the Northland.

We are informed that the Northland will leave Seattle Thursday, March 25.

We have checked up your order carefully and have made a few changes, as follows:

We have decreased your order for case gasoline to 200 cases; also changed your order for 50 cases 70 to 86 to 5 cases; the gasoline which we are supplying on this order is 80 gravity.

We have reduced your order for Union kerosene to 100 cases.

We have reduced your order for Motoreze light in 1 gallon cans to 1 case.

We have changed your order for Motoreze medium in 1 gallon cans to 2 cases.

We have increased your order to 5 barrels of Ideal gas engine.

We have changed your order for two barrels floor oil to 5 cases. We are under the impression that two barrels of this commodity would greatly overstock you. However, if you have business in mind that we do not know of, please advise, and we will send what you wish with your next order.

We have included in your order 1 case of 6-10# pails of Green transmission grease and 1 case of 12-5# cans of Green transmission.

2 barrels of Champion engine.

5 cases of 2/5 Champion engine.

2 barrels Champion Engine heavy.

2 barrels Union light castor.

2 cases 2/5s Union light castor.

2 barrels Pacific Steam cylinder.

5 cases 2/5s Pacific Steam Cylinder.

(Testimony of J. C. McBride.)

1 barrel summer black oil.

3 barrels Perfecto gas engine oil.

10 cases 2/5s Perfecto gas engine oil. [160]

We are also including in this shipment 3 Universal floor oilers. Your price on these is \$1.25 each.

Relative to that paragraph of your letter in regard to the prices to stores, mines and canneries, prices to these people are net, and they are not to be allowed any reduced prices, excepting such canneries that we may have contract with, in which case the price is $\frac{1}{2}c$ off.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA.

By C. M. COVELL,

JCC.

Special Agent.

Whereupon letter was received in evidence and marked Defendant's Exhibit "A-1."

Mr. FAULKNER.—I don't think those pencil marks make any difference. We'll ask the clerk to erase them, unless counsel wants to cross-examine the witness on them.

Q. Now, Mr. McBride, I'll hand you a telegram marked April 5, 1916, and ask from whom you received that.

A. From the Union Oil Company of Seattle.

Mr. FAULKNER.—We'll offer that in evidence.

Judge WINN.—The same objection, if your Honor please.

The COURT.—Objection overruled.

(Testimony of J. C. McBride.)

(Whereupon said telegram was received in evidence and marked Defendant's Exhibit "B-1," and then read, as follows:)

Defendant's Exhibit "B-1."

Seattle, April 5, 1916.

C. W. Young Co.,
Juneau.

Please do not solicit any further business for us owing to unreasonable advance in freight rates we will be unable to make you any further shipments.

UNION OIL CO. OF CALIFORNIA.

Q. Now, after you received that telegram, Mr. McBride, did you take up with them the matter of further shipments? A. Yes, sir.

Q. Did you receive some further shipments after that? A. Yes, sir. [161]

Judge WINN.—Object to it as incompetent, irrelevant and immaterial, and the same objection that we made to the other questions.

The COURT.—Objection overruled.

Q. Did they, or did they not cancel their contract from then on? A. No, sir.

Judge WINN.—Object to it as calling for a conclusion of the witness.

The COURT.—Objection overruled.

Judge WINN.—As to what was done.

Q. Now, Mr. McBride, when this agency was at an end, did you have some discussions with the officers of the Union Oil Company regarding an adjustment of these differences? A. Yes, sir.

Judge WINN.—We object to that.

The COURT.—Which agency.

Mr. FAULKNER.—There was— The agency at Juneau for the sale of oils at Juneau.

A. I—

Judge WINN.—(Interrupting.) Wait; wait—

The COURT.—Wait a moment. There are two separate contracts.

Mr. FAULKNER.—Well, I mean at the end of the whole transaction.

The COURT.—In 1918?

Mr. FAULKNER.—In 1918 and 1919.

Mr. KELLEY.—Well, fix the time.

Mr. FAULKNER.—I'm going to introduce letters to show.

Judge WINN.—Well, then, the letters will be the best evidence. [162]

Mr. FAULKNER.—I have to lay a foundation for the introduction of the letters.

The COURT.—It is simply preliminary.

Judge WINN.—I want to object to it as being irrelevant and immaterial under the issues in this case and under the answer and the counterclaim or cross-complaint would not permit anything of this kind to be introduced in evidence.

Mr. FAULKNER.—Here is an allegation that there was some specific payments on those differences.

Judge WINN.—That is evidence of a settlement that you are trying to introduce?

(Testimony of J. C. McBride.)

Mr. FAULKNER.—No; evidence of the acknowledgment of the balance due; balance due the C. W. Young Company.

Judge WINN.—I don't think that it is competent, your Honor, and I object. You might introduce negotiations for a settlement.

The COURT.—I think I will allow it because of Mr. Trew's testimony that there was an adjustment, a personal adjustment had and a balancing, and I think his testimony also was that there was no question of any differences between them. The objection will be overruled.

Mr. KELLEY.—Exception.

Q. Now, Mr. McBride, who succeeded Mr. Clagett, as district manager at Seattle, do you remember?

A. I can't recall his name just this minute.

Q. Well, I'll hand you a letter marked April 25, 1919, and ask you from whom you received that?

A. This is from the Union Oil Company at Seattle.

Q. Who signed it? [163]

A. That doesn't—I can't—

Q. Condlon? A. Condlon; yes.

Q. Who is Mr. Condlon?

A. He followed Mr. Clagett as district manager.

Q. Succeeded Mr. Clagett. We now offer that letter in evidence.

Judge WINN.—We object to that letter; the same objections that we have made to the others. In ad-

(Testimony of J. C. McBride.)

dition to the other objections, I think it is absolutely immaterial.

Mr. FAULKNER.—That is simply preliminary.

Mr. KELLEY.—I would like to have counsel introduce all the letters at once so that we may make our objection to all of them at the same time if they pertain to the same transaction.

Mr. FAULKNER.—I just wanted to introduce those letters in their order—there are four of them—in their order as to date. That letter wouldn't be very material, but it's the other ones that follow.

The COURT.—I don't see the materiality of this one.

Mr. FAULKNER.—I'll state that this is simply preliminary to the others. It would be immaterial standing alone.

The COURT.—You might offer it and have it identified and then connect it up with the others and then offer the others in evidence.

Q. I'll hand you another letter, Mr. McBride, and ask you from whom you received that.

A. From the Union Oil Company; Mr. Condlon.

Q. To the C. W. Young Company.

A. Yes. [164]

Mr. FAULKNER.—We'll offer that in evidence.

Judge WINN.—The same objection.

Mr. FAULKNER.—I might state that the whole purpose of these letters and that telegram—

The COURT.—(Interrupting.) Which telegram is it?

Mr. FAULKNER.—The telegram asking the C. W. Young Company not to solicit any further business.

The COURT.—What is the date of that?

Mr. FAULKNER.—April 5, 1916. The purpose of introducing this evidence is to show the acknowledgment by the Union Oil Company of a violation of their contract.

Judge WINN.—The letter doesn't show it.

The COURT.—It doesn't show anything to that effect in that letter that you are offering in evidence; it doesn't show anything to connect it up with your purpose.

Mr. FAULKNER.—They deny sending it, for one thing. The settlement depended on the production of that telegram.

Judge WINN.—It is not admissible under the pleadings, if your Honor please. There is nothing in the pleadings to justify the introduction of the letter.

The COURT.—Objection overruled. The letters, all taken together, show that there was a controversy and adjustment after the discontinuance of the agency in 1916, and it is material on the question of the settlement between the parties as testified to by Mr. Trew, in 1918.

Mr. KELLEY.—I want to call your Honor's attention to what the witness has testified, to the effect that when he received that telegram that the contract was not canceled.

Mr. FAULKNER.—We don't contend that. [165]

Judge WINN.—That contract went on just as though the telegram had never been sent.

The COURT.—Your declaration is not warranted from his testimony. He testified afterwards he received shipments of oil.

Judge WINN.—It is admitted that they agreed to pay these respective amounts that were due and there is no dispute—

The COURT.—That is true, but the testimony of Mr. Trew was to the effect that there had been a final settlement at the time and all matters between the parties were adjusted at the time.

Judge WINN.—The pleadings admit it.

The COURT.—No; they don't. Your reply sets that up, but that is supposed to be denied.

Mr. FAULKNER.—And the telegram was introduced for the purpose of showing that there was a shortage at that time.

The COURT.—The pleadings are rather peculiar and, of course, I feel that all this testimony should go in, subject to the limitations and restrictions made by the Court afterward.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "C-1," and then read, as follows:)

(Testimony of J. C. McBride.)

Defendant's Exhibit "C-1."

Seattle, Wash. Sept. 17, 1919.

C. W. Young Company,
Juneau, Alaska.

Attention Mr. J. C. McBride.

Gentlemen:

We wrote you last on August 19th regarding the telegram in question and to date have had no reply from you. We would appreciate hearing from you by return mail, advising if you have been able to locate the telegram.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA.

W. J. CONDLON,

District Sales Manager. [166]

Q. Now, I hand you a letter dated August 19, 1919, and ask you from whom you received that.

A. From the Union Oil Company; Mr. Condlon, district manager.

Mr. FAULKNER.—We offer that in evidence.

Judge WINN.—The same objection, if your Honor please, and it is not admissible under any issues raised on the pleadings.

The COURT.—Objection overruled.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "D-1.")

Defendant's Exhibit "D-1."

Seattle, Wash., Aug. 19, 1919.

C. W. Young Co.,
Juneau, Alaska.

Attention Mr. J. C. McBride.

Gentlemen:

The writer has been talking to Mr. Earl Naud regarding the telegram which was sent you from the Seattle office early in the summer of 1916. Mr. Naud advises that he was not in your employ at that time and Mr. McKenzie, who is now working for us as salesman, states that was the time the telegram was received.

We have called at both the cable and wireless offices in this city, trying to obtain the original copy, but they advise that the government instructed them to destroy all telegrams over two years old and they are therefore, unable to comply with our request.

We suggest that you get in touch with the local office of both the wireless and the cable and they may be able to produce this telegram for you. We trust you will give this matter your attention, as we are very anxious to forward this telegram to Mr. Ralph, so that adjustment can be made of your account.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA,
W. J. CONDLON,
District Sales Manager.

(Testimony of J. C. McBride.)

Q. I hand you another letter, dated Seattle, December 30, 1919, and ask you from whom you received that? [167]

A. From the Union Oil Company.

Q. From Seattle? A. From Seattle.

Mr. FAULKNER.—We offer that in evidence.

Judge WINN.—The same objection.

The COURT.—The same ruling.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "E-1.")

Mr. FAULKNER.—The letter is as follows:

Defendant's Exhibit "E-1."

Seattle, Wash., Dec. 30, 1919.

C. W. Young Co.,

Juneau, Alaska.

Gentlemen:

Our Mr. C. W. Ralph in his conversation with you when you were last in Seattle agreed to make some adjustment of your account, provided you were able to produce a telegram sent from this office, advising that the agency had been discontinued.

We have given you ample time in which to produce the original telegram, but so far have not received the same. Mr. Ralph now advises that he cannot wait further and we will, therefore, appreciate receiving payment of our account.

It may be possible that you received a telegram from us, advising that we could not make shipment of some large order on account of transportation, but we are positive that you did not receive a tele-

(Testimony of J. C. McBride.)

gram advising that the agency would be discontinued. Both Mr. Kelly and Mr. Clendening who were in the Seattle office at the time, are positive that no such telegram was sent.

You advised our Mr. Trew when he was in Juneau that you thought you were entitled to some adjustment, but that if the Union Oil Company insisted on payment you would let us have remittance.

Will you kindly advise us when we may look for payment.

Yours very truly,

UNION OIL COMPANY OF CALIFORNIA.

W. J. CONDLON,

District Sales Manager. [168]

Q. Mr. McBride, you testified Saturday—there was a letter introduced here Saturday which you identified, in which you stated to the Union Oil Company that you had changed the price, either reduced or increased the price of oil. Now, I will ask you if you had advice about that from the Union Oil Company? A. Yes, sir.

Q. Who controlled the price of oil. —

Judge WINN.—I object to that, if your Honor please. It's fixed by the contract. The contract is in evidence.

Mr. FAULKNER.—But there is some testimony about changing it from time to time.

The COURT.—I don't think that the first contract, as set up in the pleadings, sets forth.

Mr. FAULKNER.—Prices were changing.

(Testimony of J. C. McBride.)

Mr. KELLEY.—Well, the Seattle office made the price.

Q. Now, in the particular instance mentioned Saturday, did you have specific authority from the company to change the price of oil? A. Yes, sir.

Q. Now, I hand you a letter—I don't know what the date of it is. A. May 29, 1915.

The COURT.—What date?

The WITNESS.—May 29, 1915.

Q. From whom was that received?

A. From the Union Oil Company; Mr. Clagett, District Manager.

Q. To the C. W. Young Co.? A. Yes, sir.

Mr. FAULKNER.—We'll offer that in evidence. [169]

Judge WINN.—Object to it.

Mr. FAULKNER.—The only purpose is this: The testimony and the contracts show that the C. W. Young Company would get a cent a gallon commission on sales of oil. Now, of course, if they sold below the Union Oil Company price, I suppose they would have to stand the difference, and there has been a letter introduced here, showing that on one occasion they did that, and I want to show that they were authorized by the company.

Judge WINN.—Well, there is no question, in replying to Mr. Faulkner, that under all these agreements, the Union Oil Company was to regulate prices. But this letter that he seeks to introduce now, I think is immaterial for any purpose whatsoever—simply encumbering the record. I urge

(Testimony of J. C. McBride.)

this objection besides the other objections that I have urged heretofore. It don't tend to prove any issues or disprove any issues in the case.

The COURT.—There is no issue raised on that question. It is simply that the Union Oil Company is suing on account of oils sold by Mr. McBride or the C. W. Young Company—

Mr. FAULKNER.—The only materiality of this is this. We introduced a letter from Mr. McBride to the Union Oil Company. In that letter he mentioned changing the price on one occasion. Now, it would make a difference if he arbitrarily changed the price. It would make a difference in his commission, because naturally that would have to come out of his commission, and we would naturally have to take that into consideration in computing his commission, unless he was authorized to change the price, and I propose to show that he was authorized by the Union Oil Company [170] so that his commission would be unchanged. It is very material.

The COURT.—I don't think so. It simply changes the amount that you will be liable for to the company. It doesn't make any difference as to what the commission would be. It was a fixed commission. Objection sustained.

Q. Now, Mr. McBride, I will ask you if the C. W. Young Company furnished the Union Oil Company with a bond for the faithful performance of this contract? A. Yes, sir.

Q. In what sum, do you remember?

(Testimony of J. C. McBride.)

A. \$5,000; I think it was.

Judge WINN.—Object to that as immaterial.

The COURT.—I think so.

Judge WINN.—The Union Oil Company paid the premium.

Mr. FAULKNER.—Simply to show that that was another one of the conditions of the contract.

The COURT.—Well, no breach of it.

Mr. FAULKNER.—No, no breach of it. I simply want to show that there was another consideration furnished by the company in addition to furnishing the facilities and having their sales organization on hand.

Mr. KELLEY.—Well, that's outlined by Mr. Kelly's letter.

Mr. FAULKNER.—Yes.

Mr. KELLEY.—Says that you were to furnish the bond and the Union Oil Company to pay the premium.

The COURT.—Objection sustained.

Q. Now, I might ask you this question, Mr. McBride. Don't answer this if it is objected to. In the year 1915, did [171] the Union Oil Company qualify to do business in Alaska?

Judge WINN.—Object to it, if your Honor please.

Mr. FAULKNER.—There is a denial that they knew anything about this contract. This really is the best evidence. I could introduce the record of the Court.

The COURT.—Denial?

Mr. FAULKNER.—Denial that this contract was in effect.

Judge WINN.—Oh, no; we denied about the oral contract as set up in the pleadings.

The COURT.—So I understood—not that they knew nothing about the contract, but that they deny the terms of the contract.

Mr. FAULKNER.—Well, I thought that they denied the whole contract.

The COURT.—Well, if they deny the contract, deny the terms, of course, they deny the contract.

Mr. FAULKNER.—Well, I'll offer to prove now—I offer to introduce this for the purpose of showing that the company itself knew all about these transactions in Alaska. It isn't absolutely conclusive, but it corroborates Mr. McBride's testimony by showing that they qualified to do business in Alaska.

The COURT.—You object?

Judge WINN.—We will admit, if your Honor please, to shorten the record, that the company was qualified to do business in Alaska in 1915, 1916 and 1917. I believe that if the pleadings are not broad enough to show that the plaintiff was, we will admit it, so as to save trouble.

Mr. FAULKNER.—We also want to know who the resident agent of the company was, appointed by the company. [172]

Mr. KELLEY.—We think that Mr. McBride was.

Mr. FAULKNER.—Well, if you admit that, I will go no further into it.

(Testimony of J. C. McBride.)

The COURT.—Do you admit that?

Judge WINN.—It's our understanding that that is true. Isn't that what the record shows, Mr. Faulkner?

Mr. FAULKNER.—Yes.

Judge WINN.—Well, if that is what the record shows.

Mr. FAULKNER.—I have a great many orders here. I don't know that it is going to be material to introduce them all. Of course, if the Court thinks it is material, I can introduce these various telegrams.

The COURT.—I am not going to advise you.

Q. Mr. McBride, I will ask you if you have on hand, if the C. W. Young Company has on hand all the orders that were sent to the Union Oil Company for oil during these three years?

A. No, sir.

Q. You haven't? A. No, sir.

Q. Couldn't you tell from the records that you have what orders were filled and what orders were not filled? A. No, sir.

The COURT.—You could not?

The WITNESS.—No, I couldn't.

Q. I'll hand you some telegrams and ask you who sent those telegrams and to whom they were sent?

Q. C. W. Young Company sent them to the Union Oil Company.

Mr. FAULKNER.—Now, I'll ask, make a demand on counsel for [173] the original telegrams,

(Testimony of J. C. McBride.)

dated January 13, 1916, March 25, 1916 and July 17, 1916. We offer these three in evidence first.

Judge WINN.—We object to their introduction for the same reason as heretofore stated.

Mr. FAULKNER.—Simply cumulative and corroborative. Shows that orders were sent from time to time by telegram.

The COURT.—Objection overruled. Of course, such evidence is always subject to being connected up.

Mr. FAULKNER.—Yes.

(Whereupon said telegrams were received in evidence and marked as one exhibit, viz., Defendant's Exhibit "F-1.")

Q. These were sent from Juneau? A. Yes, sir.

(Read by Mr. Faulkner, as follows:)

Defendant's Exhibit "F-1."

Juneau, Alaska, Jan. 13, 1916.

Union Oil Company of California,
Seattle, Wash.

Ship via Northland, January 15th, one hundred fifty drums distillate, forty drums gasoline, twenty drums *maptha*, one hundred cases gasoline, twenty cases gas machine, gasoline, fifty cases Xray, three hundred cases Union kerosene. If you can possibly spare one hundred iron barrels send sixty gasoline and forty kerosene.

C. W. YOUNG CO.

(Testimony of J. C. McBride.)

Juneau, Alaska, Mar. 25, 1916.

Union Oil Company of California,
Seattle, Wash.

Ship on steamer Ravalli, sailing about March 31, one hundred fifty drums distillate, one hundred cases gasoline. Will return about two hundred empty drums on return sailing. Have oil unloaded our dock.

C. W. YOUNG CO. [174]

Juneau, July 17, 1916.

Union Oil Co. of California,
Seattle, Wash.

Ship steamer Cordova fifteen drums of gasoline, twenty-five drums distillate and we will stand difference in freight rate. This will about hold us until Wakena sails. Returning to-morrow steamer Curacao one hundred thirty empties. Be sure Wakena sails August fifth, with cargo for us.

C. W. YOUNG CO.

Q. Now, regarding this telegram of March 25, 1916, did you receive that shipment?

A. I couldn't say. I can't identify any particular shipment.

Q. Was the telegram of April 5, 1916, Defendant's Exhibit "B-1" in answer to this telegram of March 25, 1916—

Judge WINN.—(Interrupting.) Well, the telegram is part of the—

Mr. FAULKNER.—I haven't finished my question yet. I'll repeat it.

Q. Was the telegram of April 5, 1916, Defendant's Exhibit "B-1," in answer to the telegram of

(Testimony of J. C. McBride.)

March 25, 1916, Defendant's Exhibit "F-1," if you know?

Judge WINN.—Just a minute.

Mr. KELLEY.—We would like to see the two telegrams.

The COURT.—I believe one is in reference to the discontinuance.

Mr. FAULKNER.—Yes.

Judge WINN.—We think that the telegrams will show for themselves what they are. They are the best evidence. Both of them have been introduced already under our objection, and as to Mr. McBride knowing what they mean, he couldn't add to or take from the evidence or what the telegrams [175] purport to contain.

The COURT.—Objection overruled.

Q. Will you answer that yes or no?

A. Yes, sir.

Q. Here is one that I handed you a few minutes ago. It has no date on it. Do you know when that was sent. Just say yes or no?

A. I couldn't say.

Q. You couldn't say? A. No, sir.

Mr. FAULKNER.—Well, we'll not offer it.

Q. Mr. McBride, just one more question I want to ask you. Did you, on behalf of the C. W. Young Company, at any time, promise to pay the Union Oil Company the amount set forth in their complaint here, or any part of it?

A. No, sir.

Judge WINN.—What was that question?

Mr. FAULKNER.—Did he promise to pay the

(Testimony of J. C. McBride.)

Union Oil Company the amount set forth or any part of it.

Judge WINN.—We object as calling for a conclusion of the witness, and the pleadings speak for themselves, and the testimony of this witness couldn't vary the issues raised under the pleadings in this case.

Mr. FAULKNER.—The question is, did he promise to pay to them money.

The COURT.—Yes; objection overruled. He may answer.

A. No, sir.

Mr. FAULKNER.—In connecting up those letters from Mr. Condlon, regarding the telegram of April 16, there is one that was marked for identification and not introduced. [176] I will now offer this.

Judge WINN.—The same objection to that as to the other.

The COURT.—In reference to the telegram—?

Mr. FAULKNER.—Of April, 1916.

Mr. KELLEY.—The same objection heretofore made.

The COURT.—It may be received and filed.

(Whereupon said letter was received in evidence and marked Defendant's Exhibit "G-1.")

Recess until 1:30 P. M.

2 o'clock P. M., Monday, Jan. 22, 1923.

Court met pursuant to adjournment.

J. C. McBRIDE on witness-stand.

Cross-examination by Judge WINN.

Q. Mr. McBride, how long have you been at Juneau, Alaska?

(Testimony of J. C. McBride.)

A. Since— I have been here eighteen years in Juneau; 18 or 19.

Q. You testified, I think, on your direct examination, that you were president of the defendant, the C. W. Young Company in this case?

A. Yes, sir.

Q. You were president and manager of that company during all the time that these transactions took place between the Union Oil Company and the C. W. Young Company, were you not?

A. Yes, sir.

Q. And it was through you, acting on the part of the C. W. Young Company, with the Union Oil Company, that all these various transactions you have testified to concerning were had?

A. Yes, sir.

Q. But you are not now, nor have you been for the last two or three years, manager for the C. W. Young Company, have you? [177] A. No, sir.

Q. Mr. DeLong is there.

A. Has been for two years; yes.

Q. In fact, he has been handling it for the Seattle creditors, has he not? A. Yes, sir.

Q. Schwabacher and the Seattle Hardware Company? A. Not Schwabacher; no, sir.

Q. Seattle Hardware Company? A. Yes, sir.

Q. You haven't for a long time, taken any active part in the management of the affairs of the defendant company? A. Two years.

Q. And Mr. DeLong has been handling the affairs during all that time? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. Mr. Naud was formerly your bookkeeper while you were president and manager of the company?

A. Not all the time, Judge. He was a bookkeeper—

Q. (Interrupting.) Over what period of time was Mr. Earl Naud bookkeeper for the C. W. Young Company, while you were in the active management of its affairs.

A. I couldn't just give you those dates.

Q. Well, approximately?

A. Well, just exactly—I don't remember just what year he came here, and then he went to war and one time when I was in Seattle, he asked if I would take him back, and I brought him back. That was in 1917, I think.

Q. Was he bookkeeper for the C. W. Young Company at all of the times that these transactions were taking place between [178] that company and the Union Oil Company? A. No, sir.

Q. About what length of that time was Mr. Earl Naud bookkeeper for that company?

A. I think it was just one year.

Q. From what date to what date, approximately?

A. I couldn't say that.

Q. What year? A. 1917.

Q. Do you know when he commenced in 1917 and when he quit? A. No; I don't.

Q. Now, Mr. McBride, in answer to a question propounded by Mr. Faulkner, you stated something about furnishing wharf facilities for the

(Testimony of J. C. McBride.)

Union Oil Company, or for some purpose, that is the dock that lies between here and Thane, is it not?

A. The dock is there, yes, sir—about a mile and a half or a mile and a quarter from town.

Q. Is it on the Juneau side?

A. On the mainland side.

Q. Huh?

A. On the mainland side.

Q. Yes.

A. Between Thane and Juneau.

Q. It's on the road between here and Thane?

A. Yes.

Q. On the mainland side? A. Yes.

Q. Is it this side, taking Juneau as the standpoint, of the Standard Oil Company's dock, or on the other side? A. On the other side. [179]

Q. Now, Mr. McBride, when did you build that dock? A. In 1915.

Q. Who drove the piles for that dock?

Mr. FAULKNER.—If the Court please, counsel objected to this line of examination when I offered to put it in, and I think I'll object to it now as incompetent, irrelevant and immaterial, to shorten up the record.

Judge WINN.—I simply want to find out when he built it.

The COURT.—He has already stated that he built it in 1915.

Q. Isn't it a fact that you built that dock and had a lot of piles driven there in 1913? A. No, sir.

(Testimony of J. C. McBride.)

Q. Didn't Bob Keeney drive those piles for that dock in 1913?

A. I don't remember who it was who drove the dock. As I recall it, Ed. Webster was the owner of the pile-driver.

Q. He did the work on the pile-driver. And wasn't that work done in 1913? A. No, sir.

Q. You are positive of that? A. Yes, sir.

Q. Wasn't the piling and the wharf constructed in 1913? A. No, sir.

Q. You're sure of that? A. Yes, sir.

Q. You know Mr. Lloyd Hill? A. Yes, sir.

Q. Mr. Lloyd Hill surveyed that site for the construction of that wharf in 1913 for you, didn't he?

A. I don't remember that he surveyed it now.

[180]

Q. Are you that careless of your affairs, Jack, that you don't remember who made the survey of that wharf down there in 1913?

Mr. FAULKNER.—If the Court please, I object to this line of questioning.

The COURT.—Objection sustained.

Mr. FAULKNER.—Simply to shorten up the record.

Q. You were connected with the construction of that wharf were you not?

A. Yes, sir; I was connected with it.

Q. Well, do you want to tell the Court and jury that you can't tell the year that that was surveyed, who surveyed it nor the year it was built?

Mr. FAULKNER.—The same objection.

(Testimony of J. C. McBride.)

The COURT.—Objection sustained.

Q. Well, did Lloyd Hill survey that?

A. I won't say as to that.

Mr. FAULKNER.—The same objection.

The COURT.—Objection sustained.

Q. You don't know who did?

The COURT.—You needn't answer until—

Judge WINN.—(Interrupting.) I want to show, if your Honor please, that the dock was constructed there before—

The COURT.—Well, you can get at it in another way. It is admitted by you that satisfactory accommodations were furnished by the defendant, and the date it was furnished, or constructed, is not material, because you objected to questions about the value of the dock and any testimony as to the value of the dock was ruled out. [181]

Q. You did state to Mr. Faulkner, on direct examination, did you not, Mr. McBride, that that wharf was built for the purpose of handling the oil of the Union Oil Company, didn't you?

A. Yes, sir.

Q. Now, isn't it a fact that it was built before you ever had any contract or agreement with the Union Oil Company? A. No, sir.

Q. And it wasn't built in 1913?

Mr. FAULKNER.—If the Court please, I don't want to keep objecting to this line of examination, and I ask that he be not permitted to go into it any further, unless we are permitted to go into it, and we were shut out.

(Testimony of J. C. McBride.)

The COURT.—Yes; the cost of the construction of the dock under the pleadings and under your objection I held was not material, because there was no basis of compensation for damages placed in the pleadings on the construction of the dock. So, if he furnished a dock, satisfactory and in compliance with his contract, that's all that is necessary to be proved in this case.

Judge WINN.—My recollection is that he testified that he built it in a certain year, if your Honor please, and I was just simply cross-examining him on it.

The COURT.—The construction of the dock is not a basis of compensation for damages in the case, and it has been admitted on your side that he furnished facilities satisfactory to the plaintiff in the case, and with reference to that part of the contract, any cross-examination on that point, as to when it was constructed, is not proper and immaterial. [182]

Judge WINN.—All right. Allow us an exception.

The COURT.—You may take your exception.

Q. Now, Mr. McBride, when did you first have any conversation with any one of the parties to whom you have referred to in your testimony, representing the Union Oil Company, concerning either one of these purported contracts?

A. It was in the early part of 1915.

Q. With whom did you have that conversation?

A. Mr. Clagett.

(Testimony of J. C. McBride.)

Q. Where? A. Seattle.

Q. Do you remember that conversation?

A. No, sir; not the exact date.

Q. Do you remember approximately?

A. It was in the early part of the year 1915. I don't remember the date now.

Q. January or February?

A. Well, I don't— Probably around the latter part of January or the first of February. I don't remember the exact date.

Q. What time did you go to Seattle from Juneau, or go to Seattle in 1915?

A. I think it was in January.

Q. Or any other place. A. It was in—

Q. (Interrupting.) What was that?

A. It was in January.

Q. Then it is probable that you and Mr. Clagett had some conversations about this matter in January, 1915? A. Yes, sir.

Q. And in February, 1915? [183]

A. Yes, sir. .

Q. How many conversations did you have with Mr. Clagett?

A. I might say that Clagett and I were very friendly and we visited always together when I was in Seattle, and we had some conversations during that time.

Q. Could you state to the Court and jury approximately how many conversations in January and March, 1915, it was that you had with Mr. Clagett concerning the Union Oil Company fur-

(Testimony of J. C. McBride.)

nishing any oil to the C. W. Young Company in Juneau? A. No; I couldn't.

Q. Where did these conversations take place?

A. Both at the company's office and at the hotel I was stopping at—the Rainier Grand Hotel.

Q. You know Mr. Trew here, don't you?

A. Yes, sir.

Q. You knew Mr. Kelley? A. Yes, sir.

Q. And you recalled the name of some other representative of that company this morning—what is his name—Condlon. Do you remember Mr. Condlon? A. Yes, sir.

Q. Were either or any of these parties that I have last mentioned present when you had these conversations with Mr. Clagett?

A. I know that Mr. Trew was, because Mr. Trew; as I have already stated, Mr. Trew—I didn't state that Mr. Trew and I were friends, but we are and were then, and, I might say, we are now. They called on me at the hotel and when I was out to their office we had conversations. I know that Mr. Trew was present at some of those conversations.

Q. You testified before in this case, did you not, Mr. McBride, [184] by deposition that was taken before Mr. Folta, here? A. Yes, sir.

Q. Didn't you testify then, before Mr. Folta, that these conversations took place with Mr. Clagett in the presence of Mr. Kelly and Mr. Trew and Mr. Clendening? A. Mr. Trew?

Q. Clendening.

(Testimony of J. C. McBride.)

A. Well, I know that some of them were in their presence.

Q. Well, these parties, Mr. McBride, were present at most of the conversations you had with Mr. Clagett concerning the shipping of oil to Juneau by the Union Oil Company, were they not?

A. Regarding the contract I made with Mr. Clagett; yes, sir.

Q. They were. And those conversations took place in the office of the Union Oil Company in Seattle? A. Yes; and at the hotel.

Q. Now, when was the last conversation that you had with Mr. Clagett, when these other three gentlemen were present, concerning the shipping of oil to Juneau by the Union Oil Company?

A. I couldn't state that.

Q. Well, could you state to the jury how late in 1915 it was, in what month?

A. Well, I wouldn't say. Late, in October, 1915, I went to Seattle regarding this oil contract, and I wouldn't state now that these gentlemen were—I don't recall that they were or were not present at that time.

Q. That was in October, 1915? A. Yes.

Q. But now they had been shipping oil to you?
[185] A. Yes, sir.

Q. As representative of the C. W. Young Company, for a long time before October, 1915?

A. Yes, sir.

Q. All of a year? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. The principal shipments of oil and greases from that company to the C. W. Young Company, had taken place prior to October, 1915, had it not?

A. Yes, sir; I understood you, Judge, to ask me when was the latest I had a conversation with him in 1915, and I was just trying to answer your question.

Q. Oh, no. Well, I'll make that more definite. On this trip you were down there in January and February and part of March, were you not, in 1915?

A. I think that was the time. I don't just remember the exact dates, but it was the early part of 1915.

Q. Well, how long did you stay in Seattle?

A. I don't remember that.

Q. Do you remember what month it was in 1915; that is, January, February or March, and the date, the last conversation that you had with these three gentlemen, or with Mr. Clagett, concerning the shipment of oil to Juneau?

A. No; I don't remember that—the last conversation.

Q. You evidently stayed in Seattle until the first of March, 1915, didn't you?

A. I don't remember the dates—just what date it was.

Q. Well, now, Mr. McBride, you identified an exhibit that has been offered in this case, which was dated on the date of March 1, 1915, the origi-

(Testimony of J. C. McBride.)

nal I haven't—I have a copy— [186] I'll withdraw that last question. I'll ask you Mr. McBride another question. The Kelly whom you state was present at these various conversations that I have asked you about, is not Mr. Kelley, the attorney here, is it? A. No, sir.

Q. Mr. V. H. Kelly.

A. I think that's his name. I think his initials are V. H.

Q. Now, I asked you something about a letter which you claim was written to you by Mr. Clagett, under date of March 1, 1915. It has been offered in evidence in this case and marked Defendant's Exhibit "A"; and I will ask you to look at it and refresh your mind and state as to whether or not you were not in Seattle at the time that letter was written and were stopping at the Rainier-Grand Hotel?

A. Yes; I received that letter at the Rainier-Grand.

Q. And prior to the writing of this letter to you by Mr. Clagett you had had several conversations with him, in the presence of Mr. V. H. Kelly and Mr. Trew here, and Mr. Clendening?

A. Well, my conversations mostly were with Mr. Clagett.

Q. Didn't you say awhile ago that Mr. Kelley, Mr. Clendening and Mr. Trew were present at most of those conversations?

A. I don't know just what I said, but I say that most of my conversations—they were, at times,

(Testimony of J. C. McBride.)

present, but most of my conversations, all of my conversations were with Mr. Clagett.

Q. Is it not a fact that these other three parties that I have just mentioned, were present when matters that were material to the shipment of oil to Juneau, were talked over?

A. Well, not at all times; no, sir.

Q. Not at all times. [187] A. No, sir.

Q. Now, you have read over this exhibit that I have just shown to you, which is in the form of a letter from Mr. Clagett to you, and he states there, "In confirmation of our various conversations in the past, and referring particularly to phone conversation with you this morning, I take pleasure in stating that we are now ready to ship oils to Juneau," and so forth. Now, you had had several conversations with Mr. Kelly, with Mr. Clagett and these other parties before he had written you that letter, hadn't you? A. Yes, sir.

Q. You had talked over the various matters contained in that letter, had you not?

A. With Mr. Clagett.

Q. Yes. And sometimes these other three parties that I have mentioned would be present, would they not?

A. Well, Judge, I might say this—

Q. Well, just answer my question. Were the other parties present or not? I want a direct answer.

A. They were at times; yes, but not through any agreement. The agreement that I made with Clag-

(Testimony of J. C. McBride.)

ett, we made it together, and I don't think that these men were present at that time. Mr. Clagett made the agreement for the Union Oil Company with me, and as I say now, we were all friendly and we called in there—

Q. (Interrupting.) I don't care about that dissertation.

A. I was just trying to explain to you—

Q. Yes; but isn't it a fact that most of the conversations that took place relative to this agreement or understanding which was arrived at, concerning the shipment of oil in 1915 and [188] 1916 up here, that at those conversations Mr. Clagett and these other three parties that I have mentioned were present? Didn't you state that a few moments ago?

A. Oh, I don't think I did state that they were there most of the time. They were there at times, but my business was all with Mr. Clagett.

Q. And you talked over, then, with Mr. Clagett, but not with the other three parties, the various matters that are set up and referred to in these letters or rather the letter which is marked Defendant's Exhibit "A" in this case, which I have just shown to you? A. Yes, sir.

Q. How long did you stay in Seattle after you received that letter?

A. That I couldn't say; not very long, Judge.

Q. You got the matters fixed up and came to Juneau? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. Now, Mr. McBride, Mr. Faulkner has gone over with you a good many matters, and I don't expect to cover all of them, but I do wish to refer you to the bill of particulars that has been filed in this case and verified by you and question you something concerning it. Have you a copy of that bill of particulars?

A. I don't believe I have, just at the moment.

Q. (Handing paper to witness.) The first item on this bill of particulars is, or are, those items concerning the Hoonah Packing Company at Hoonah, and you have set forth there, in 1915, 1916 and 1917, various kinds of products that you claim that you might have disposed of to that company. With whom did you have your conversation concerning the furnishing [189] of those products for the years 1915 and 1916, as set forth in this bill of particulars? A. C. J. Alexander.

Q. What time and where was it that you had a conversation with C. J. Alexander?

A. My first conversation with him was in 1914, here in Juneau.

Q. In 1914? A. Yes, sir.

Q. At what place and when, do you remember?

A. In my office.

Q. In your office. Was anybody else present, or was it just you and Mr. C. J. Alexander?

A. I don't remember that. There might have been someone in the office, but I would say that it was just the two of us.

(Testimony of J. C. McBride.)

Q. That was in 1914. That was prior to the time of the alleged contract of 1915-1916-1917, wasn't it? A. Yes, sir.

Q. Was this conversation that you had with Mr. C. J. Alexander, who is commonly known as "Kinky" Alexander, in 1915, or in 1914, concerning this matter, the only conversation you had with him about it? A. The only one? No, sir.

Q. The only conversation.

A. Only one? No, sir; it wasn't.

Q. How many times during, say, 1915, did you have any conversations with him?

A. Well, my conversation with him in 1915, was in the early part of the year, regarding the contract.

Q. That first conversation was in 1914?

A. Yes, sir. [190]

Q. Your second one was in 1915? A. Yes, sir.

Q. Did you have conversation concerning the matter in 1916? A. Yes, sir.

Q. With C. J. Alexander? A. Yes, sir.

Q. And in 1917? A. Yes, sir.

Q. Where was he, at each one of these conversations, these respective years, when you had these conversations with him? A. Mostly in Juneau.

Q. Mostly in Juneau. A. Yes, sir.

Q. Did you enter into any writing concerning any matters about furnishing the Hoonah Packing Company, which Mr. Alexander represented, any oils, for any one of these years?

A. Not at that time.

(Testimony of J. C. McBride.)

Q. Did you ever have? A. Some contract?

Q. Yes. A. No, sir.

Q. How was it that you arrived at the fact that you have set forth in this bill of particulars and which you have testified to concerning, that, for instance, during the year 1915, that you could have furnished the Hoonah Packing Company 50,000 gallons of refined oil and 2,500 gallons of lubricating oils? A. That's what he told me.

Q. He told you that in 1914 or in 1915.

A. Both years. [191]

Q. 1914. Don't you know that Mr. Alexander didn't get any oil from you, that he bought it from the Standard Oil Company during the year of 1915, and had a contract with them?

A. Well, I know that he didn't get any from me.

Q. But he told you in 1914 and before you had the agreement with the Union Oil Company, that he would, in 1915, take these respective amounts of oils that I have enumerated for you, in the year 1915? A. Yes, sir.

Q. Now, then, in 1916, Mr. McBride, you have set forth in your bill of particulars, pertaining to this Hoonah Packing Company, that you could have sold 50,000 gallons of refined oil and 2,500 gallons of lubricating oil. The matter concerning this transaction was a mere conversation between you and Mr. Alexander?

A. It was a conversation; yes, sir.

Q. When did that conversation take place?

(Testimony of J. C. McBride.)

A. While I was in Seattle again, the following year. Late in the fall we talked about the matter; then again in Seattle, regarding the delivery of oils to him.

Q. That was regarding his taking oil from you in 1916? A. Yes, sir.

Q. I'm just questioning you about 1916.

A. Yes; I understand.

Q. Did he specify to you the exact number of gallons that he would take from you for the Hoonah Packing Company for 1916? A. Yes, sir.

Q. What did he tell you he would take?

A. He told me he would take 50,000 gallons of refined oil.

Q. And how much of the other—lubricating oil? [192] A. 2,500 gallons.

Q. He didn't take it? A. No, sir.

Q. Don't you know that he had a contract with the Standard Oil Company for oil during that year, 1916? A. No; I don't know.

Q. He got his oil from the Standard Oil Company? A. Well, I couldn't deliver it to him.

Q. Well, he didn't get any from you?

A. No; he didn't.

Q. Did he take any boat up there and demand any of you? A. Yes, sir.

Q. How many times? A. Oh, several times.

Q. Where and on what occasions?

A. I don't know just the dates.

Q. You don't know the dates? A. No, sir.

Q. You don't know the amount that he wanted?

(Testimony of J. C. McBride.)

A. No; he would come for a cargo of oil and I don't know just what the cargo would be.

Q. What kind of oil? A. Refined oil.

Q. What kind of refined oil? A. Distillate.

Q. You have looked over this letter of Mr. Claggett's which has been offered in evidence in this case and marked Defendant's Exhibit "A," where he enumerates certain kinds of oil that he might be able to ship to the C. W. Young Company. Can you look over that exhibit and state to the Court and jury [193] what kind of oils it was for 1915 and 1916 that you had a contract for, or that you had this conversation with Mr. Alexander about taking, for those respective years?

A. The kind of oil?

Q. The kind of oil that is enumerated in this exhibit "A." There are several kinds there.

A. Well, it was refined oil and lubricating oil.

Q. Yes, but there are several kinds of refined oil and lubricating oil in this agreement.

A. Yes.

Q. Can you tell the Court and jury what kind of oil this conversation referred to?

A. I couldn't tell you the details; just the gallons, as to the number of gallons and the kinds of oil he would take; not the number of gallons of each kind of oil.

Q. Either for 1915 or 1916? A. No, sir.

Q. Well, did you have any conversation with him about furnishing oil, you furnishing him oil, refined oil or lubricating oil for the year 1917?

(Testimony of J. C. McBride.)

A. Yes, sir.

Q. Where did that conversation take place?

A. Here and in Seattle.

Q. What did he say to you?

A. He agreed to give me an order for the number of gallons that I specified there, if I could deliver it.

Q. You remember that as far back as 1914, just the exact number of gallons that he promised he would take? A. Yes, sir.

Q. Depending on your memory entirely, are you?

A. Yes, sir. [194]

Q. Also depend on your memory for what you say he spoke to you about that he would take for the year of 1917? A. Yes, sir.

Q. Don't you know that he had a contract with the Standard Oil Company and that the Standard Oil Company furnished him oil for 1917?

A. Well, I have a letter from him in which he verifies those figures. I don't know as I had a contract with him, but he had a contract with me and verified it.

Q. Is that letter in evidence here?

A. Yes, sir.

Q. Well, that letter speaks for itself. You don't remember the date and the exhibit number of the letter? A. Yes.

Q. This one isn't in evidence, is it?

Mr. FAULKNER.—It isn't in evidence yet.

Q. Well, I don't want to question you about any

(Testimony of J. C. McBride.)

letter that is not in evidence yet. I'll just withdraw that question for the time being.

Q. You or Mr. Faulkner has handed me a letter here that you say verifies the figures. Is this the letter? A. Yes, sir.

Judge WINN.—Well, I would like to have this letter properly identified as part of the cross-examination— Well, I'll give you the date so that if we refer to it hereafter— That's dated February 4, 1922, isn't it, that you refer to? A. Yes, sir.

Q. Well, have you had any correspondence with Mr. Alexander concerning this oil that you say would verify your statement covering the years of 1915, 1916 and 1917—any [195] letters or correspondence?

A. I didn't just hear the first part of that?

Q. I say, you have no letters in your possession that was written you by Mr. Alexander, during the years of 1915, 1916 and 1917?

A. No, I haven't.

Q. The only one that he wrote you is the letter that you have identified there? A. Yes, sir.

Q. It being under the date of February 4, 1922.

A. Yes.

Q. Now, the next item on the bill of particulars, Mr. McBride, that you have furnished us and which you have sworn to, is the Hoonah Packing Company, "Gambier" marked underneath it. That means the Hoonah Packing Company's cannery at Gambier Bay does it not? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. And you claim in your bill of particulars here, an item of refined oil for the year of 1917 only?

A. Yes.

Q. And also lubricating oil for the year of 1917 only, and it is 40,000 gallons and 2,000 gallons respectively, of those particular products. Who did you have a conversation with about this oil?

A. Howard Bailey.

Q. Howard Bailey.

A. He's superintendent of the Gambier cannery.

Q. Where was Howard Bailey when you had this conversation? A. This was in Seattle. [196]

Q. In Seattle. What time was it in 1917 that you had this conversation with Mr. Bailey?

A. It was in the early spring or in the winter-time.

Q. Of 1917? A. Yes, sir.

Q. Where was it that you had the conversation?

A. Just at what particular place?

Q. Yes, sir.

A. Well, I don't know just exactly where it was.

Q. Who was present when you had the conversation with him? A. I don't think anybody was.

Q. What did he say to you or what did you say to him?

A. Which question do you want first?

Q. Either way. I don't care which.

A. You asked me what I said to him?

Q. Either way.

The COURT.—He wants the details of the conversation.

(Testimony of J. C. McBride.)

A. Well, it was just a business conversation. I asked him if I could furnish him the oil, would he take it, and he said that he would, and I said that I would be glad to furnish him if he would take it.

Q. And he didn't take it, did he? A. No, sir.

Q. Did you have any other conversation with him about this after that time?

A. I may have had several with him during my visit to Seattle. I saw him quite frequently.

Q. How long did you stay in Seattle on this visit you made to Seattle in 1917, the time you had this first conversation with Mr. Bailey?

A. I don't know how long I was there. [197]

Q. You don't have any idea when you returned?

A. I was down there just a part of the winter; just down on a business trip. That was all.

Q. Did you have any further or other conversations with Mr. Bailey concerning this matter during the year 1917? A. We talked about it; yes.

Q. Where? A. Here in Juneau.

Q. How many times and what place?

A. Oh, I don't know how many times, Judge.

Q. What kind of oil, as classified under this letter of Mr. Claggett's, which is exhibit "A" of defendant, did your conversation with Mr. Bailey refer to? A. Refined oil?

Q. Yes. A. Well, I'd like to see this.

Q. What kind of refined oil?

A. That is the same statement. I don't know how it— That would be refined oil?

(Testimony of J. C. McBride.)

Q. Yes. A. Distillate.

Q. What kind of distillate? There's several kinds of distillate and refined oil.

A. There is only one kind of distillate, Judge.

Q. Is that the cheapest grade? A. Yes.

Q. What was the price of it at that time?

A. I don't know; I couldn't tell you.

Q. Well, the prices that are given in this letter to you, which is Mr. Clagett's letter of the date I have mentioned and [198] marked Defendant's Exhibit "A," sets forth the prices of the various sorts of lubricating oil and refined oil that they had on hand and of which they might possibly ship some to Juneau, does it not? A. I don't know.

Q. It states it, doesn't it, Mr. McBride?

A. Yes; it states distillate ten cents; bulk ten cents.

Q. Is that the value— I'll withdraw that. Is that the kind of oil that you had a conversation with Mr. Bailey about? A. Yes, sir.

Q. That is the kind? A. Yes, sir.

Q. What kind of lubricating oil was he to take? There is more than one kind?

A. More than one kind; yes.

Q. Which kind, do you know?

A. No; I don't.

Q. You don't remember? A. No, sir.

Q. That wasn't specified?

A. No; it wasn't—the number of gallons—no, sir.

Q. Did Mr. Bailey specify the number of gallons that he would take from you in 1917?

(Testimony of J. C. McBride.)

A. Yes, sir.

Q. Now, Mr. McBride, you have lived in Juneau quite a long time and have been actively engaged in business and are somewhat acquainted with the general operation of canneries in Alaska, are you not?

A. Well, just in a general way; yes. [199]

Q. Don't you know that it is impossible for any canneryman to tell in advance as to how much refined or lubricating oil he is going to use in any particular season? A. No; I don't.

Q. Now, you had this conversation with Mr. Bailey in 1917, early in that year, in Seattle?

A. Yes, sir.

Q. The fishing season for 1917 hadn't opened, had it? A. No, sir.

Q. You didn't know, and he didn't tell you, did he, how many boats he was going to run or how much lubricating oil he was going to need for the fishing boats, or anything?

A. He didn't tell me how much oil he was going to need or what he was going to use in his cannery.

Q. But he come out and told you that he would take forty thousand gallons of refined oil and two thousand gallons of lubricating oil? A. Yes, sir.

Q. That, then, in 1917, was before you had signed the contract that has been offered in evidence in this case—is relied upon as the contract between the C. W. Young Company and the Union Oil Company, was it not?

(Testimony of J. C. McBride.)

A. Well, that contract wasn't signed. The contract wasn't signed. It's dated February 14, I think, but the contract really wasn't signed, as I understand it, as I recall our letters, until the middle of the year.

Q. But it was here in your office.

A. It was going back and forth in the mails.

Q. That contract had been sent you, and it was received by you, wasn't it? [200]

A. Yes, it was received by me, but it was going back and forth in the mails. We had a little correspondence about it.

Q. These conversations you had with Mr. Bailey were prior to the time that you signed this—

A. (Interposing.) Yes, sir.

Q. (Continuing.) Contract for 1917?

A. Yes, sir.

Q. Was all this oil that Mr. Alexander said that he wanted and that Mr. Bailey said he wanted, to be taken at one time or various times?

A. Various times.

Q. Various times. No designation was made as to how much was to be taken at any particular date, either with Mr. Alexander or Mr.—

A. No, sir.

Q. What was the other man's name?

A. Bailey; Howard Bailey.

Q. Or Mr. Bailey. A. No, sir.

Q. This Mr. Alexander that you refer to and Mr. Bailey, their depositions are filed in this case, are they not?

(Testimony of J. C. McBride.)

A. I understand they are. I haven't seen them.

Q. Well, the only Howard Bailey that you had any contract with, or any conversation with, concerning oils and greases for the year of 1917, his name was Howard, in 1917? A. Yes, sir.

Q. And the only conversation that you had concerning the Hoonah Packing Company was with C. J. Alexander? A. Yes, sir.

Q. As to whether or not their depositions are on file here, you don't know? [201]

A. I haven't seen them.

Q. The next one on your bill of particulars is the Taku—it's "Can," C-a-n, and Cold Storage Company. The real name is the Taku Canning & Cold Storage Company, is it not, Mr. McBride?

A. Yes, sir.

Q. Where was that cannery?

A. I didn't hear that.

Q. I say, where was that cannery located?

A. At Taku Harbor.

Q. It's the same old cannery that's at Taku Harbor now?

A. Yes; known as Libby, McNeill & Libby.

Q. Libby, McNeill & Libby; yes. And you say that, or set forth in your bill of particulars, that during the years of 1915, 1916 and 1917, that you had some sort of arrangement by which you were to furnish that company with 40,000 gallons each for those years of refined oils and 2,000 gallons each year of lubricating oil? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. Well, with whom did you have this conversation? A. John Carlson.

Q. Where? A. Here and in Seattle.

Q. Where did you have the conversation with him about furnishing oil for 1915 and 1916?

A. In Seattle.

Q. Just briefly, what was the nature of that?

A. Well, it was just a business talk, that if I could—I asked him if I couldn't sell him his oils for the coming year, and he said, yes; that I could. [202]

Q. You remember what time it was in 1915 that you had this conversation with him, Mr. McBride?

A. No; I don't. It was when I was in Seattle.

Q. Did he make a contract then? I withdraw that. It was early in 1915 that you had the conversation with John Carlson. Now, was that conversation concerning the furnishing of the Taku Canning & Cold Storage Company with refined oils and lubricating oils for the years 1915, 1916 and 1917? A. Yes, sir.

Q. Carlson is dead, isn't he? A. Yes, sir.

Q. John Carlson is dead. You remember how long he has been dead?

A. I think, as I recall it—I wasn't here when he passed away—but I think it was in 1921, and that he died here.

Q. Well, since 1917? A. Oh, yes; yes.

Q. Do you know when he quit running the Taku Harbor cannery, and when he sold out to Libby, McNeill & Libby, or to some one else?

(Testimony of J. C. McBride.)

A. No, sir; I don't.

Q. You don't know what year he disposed of it?

A. No.

Q. Was all this oil for these respective years, both refined and lubricating oils, to be delivered to Carlson in one bulk?

A. No, sir; I was to deliver the oil to the cannery.

Q. Well, were they to take it in one bulk?

A. No, sir. [203]

Q. What kind of oil and greases specified in Defendant's Exhibit "A," was it that Mr. Carlson was to take 40,000 gallons and 2,000 gallons of respectively, for the years 1915, 1916 and 1917.

A. Distillate and lubricating oil.

Q. The prices quoted in Mr. Clagett's letter, which is exhibit "A" in this case of the defendant, are substantiall correct for all those oils, are they not? A. Yes, sir.

Q. Now, that letter was written in 1915. Didn't the price of the oils to be furnished, both refined and lubricating oil, didn't the price go up or go down in the years 1916 and 1917, of those kinds of oils that you are speaking about?

A. They advanced.

Q. They advanced? A. Yes, sir.

Q. When the war was on? They advanced, I say, after the war was on? The war commenced in 1914.

A. Well, I suppose the war did have something

(Testimony of J. C. McBride.)

to do with it. I don't know. However, they advanced.

Q. How much did they advance in 1916, do you know? A. No, sir.

Q. How much did they advance in 1917?

A. I couldn't tell you that.

Q. The lowest rate during the years 1915, 1916 and 1917 was in 1915?

A. I wouldn't say that either. I don't recall the prices.

Q. Was it agreed upon as to what kind of oil it was that Carlson was to take, which one of those grades specified in Defendant's [204] Exhibit "A," Clagett's letter? A. Lubricating oil.

Q. What kind of refined and what kind of lubricating oil Carlson was to take?

A. Yes; distillate and refined oil. I don't know the number of gallons of each kind exactly.

Q. Distillate is quoted there in 1915 at what, Mr. McBride, 10 cents a gallon? A. In 1915?

Q. Yes. A. Distillate, 10 cents a gallon.

Q. And lubricating oil what?

A. Well, you want me to read—?

Q. No; what kind of lubricating oil were you to furnish him there?

A. I don't know just what, I couldn't tell what he would use.

Q. And then the price of oils for the following years advanced in price? A. Yes, sir.

Q. Now, then, the next item pertains to the Chichagoff Mining Company, in which you set forth

(Testimony of J. C. McBride.)

in the bill of particulars refined oils for the years 1916 and 1917, 25,000 gallons in each one of those years and lubricating oil for each one of those years, 1250 gallons. With whom did you have a conversation concerning these amounts of oil?

A. Mr. Freeburn; Jim Freeburn.

Q. Don't you know that during the years 1916 and 1917, that the Union Oil Company had a contract with Mr. Freeburn and his company to furnish him these oils and greases from Seattle?

[205] A. Furnish it from here.

Q. Did you see that contract? A. No, sir.

Q. They did enter into a contract with the Union Oil Company at Seattle, didn't they? That is, Freeburn did for the Chichagoff Mining Company?

A. I don't know what his office did, Judge.

Q. You don't know what the agreement was?

A. No.

Q. You wasn't present at the time that Freeburn had any conversation or agreement with any of the representatives of the Union Oil Company concerning this refined and lubricating oil for the years which I last mentioned? A. No, sir.

Q. Now, the next is a smaller item. The Auk Bay Salmon Company, for which you have an item, for 1917, of refined oil 30,000 gallons and for the same year, 1500 gallons of lubricating oil, not specifying any—I mean this is specifying it all. With whom did you have any conversation concerning this matter? A. Billy Carlson.

Q. Who was Billy Carlson?

(Testimony of J. C. McBride.)

A. He was part owner and manager of the Auk Bay Salmon Canning Company.

Q. And the only understanding that you had with Billy Carlson, as a representative of the Auk Bay Salmon Company, was a conversation, was it?

A. Yes, sir.

Q. When was that?

A. That was in Seattle. [206]

Q. What time in Seattle?

A. When I went down in the early part of 1917.

Q. Well, won't you say what month?

A. No, sir; I don't remember.

Q. Wouldn't say whether it was January, February or March? A. No, sir.

Q. You don't know whether it was before or after the presentation to you of the contract, which I think was finally signed by you on the part of the C. W. Young Company and also signed by the Union Oil Company, for the year 1917? That is, was this conversation you had with Carlson before— A. (Interrupting.) It was before.

Q. He was to receive the same kind of lubricating oil in 1917 and the same sort of refined oil that these other parties were to receive?

A. Yes, sir.

Q. In bulk or at different times?

A. I might explain, so far as bulk is concerned, that it comes in tanks. We called it bulk.

Q. I mean was he to take it all at one time?

A. Oh, no; different times.

Q. Huh? A. Different times.

(Testimony of J. C. McBride.)

Q. You don't know whether Billy Carlson's deposition was filed in this case or not, do you?

A. I understand that it is.

Q. There was only one William Carlson that you had any conversation with concerning the furnishing of any oils to the Auk Bay Salmon Company for the year 1917? A. Yes, sir. [207]

Q. Now, Mr. McBride, without looking at the bill of particulars, can you tell me how much refined oil and how much lubricating oil you were to furnish the National Independent Fish Company for either of the years of 1915, 1916 and 1917, without referring to your memoranda from the bill of particulars or other source? Can you tell me that?

A. Well, I think I remember it from the bill of particulars as 20,000.

Q. You remember it by the bill of particulars. Now that bill of particulars of yours is signed on the 30th day of January, 1922. Then you remember, by reason of what you set forth in that bill of particulars, as to what you were to furnish to this National Independent Fisheries Company, do you? How did you arrive at it in 1922? that is, when you made out the bill of particulars?

A. To make out this bill of particulars?

Q. Yes, sir.

A. I arrived at it through orders and from memory.

Q. You didn't have any orders from Billy Carlson? A. No, I did not; not written orders.

(Testimony of J. C. McBride.):

Q. There is where you had oral orders?

A. Oral.

Q. Oral conversations? A. Yes, sir.

Q. Then, so far as Carlson is concerned, you had to depend on your memory. And what about the National Independent Fisheries? Did you depend on your memory for that? A. Yes, sir. [208]

Q. Now, then, I think, Mr. McBride, that you testified concerning this item, or these items of oil that you were to furnish the National Independent Fisheries Company for the years 1915, 1916 and 1917, on your previous examination in this case, didn't you? A. That was— I didn't—

Q. (Interrupting.) That is, I say, you testified on your previous examination in this case about the amount of oils, lubricating and refined oil that you were to furnish the National Independent Fisheries Company for the years 1915, 1916 and 1917, didn't you?

A. Well, do you mean the deposition you took?

Q. Yes, sir. A. Well, did I—

Q. (Interrupting.) Didn't you testify concerning it? You remember that?

A. You took a deposition from me; yes.

Q. And you testified concerning it?

A. To the number of gallons?

Q. Yes. A. Yes, sir.

Q. For the Independent National Fisheries Co.?

A. Yes.

Q. What was that company to use that oil for, Mr. McBride, do you know?

(Testimony of J. C. McBride.)¹

A. In my opinion, to supply their boats.

Q. What boats did they have here in 1915, 1916 and 1917?

A. They had the "King & Winge," "Scandia" and the "Idaho," I think.

Q. And that oil was to be furnished for those boats? A. Yes, sir. [209]

Q. Now, don't you know that neither one of those boats which you have mentioned just now, that that oil was to be furnished to, ever came to the port of Juneau in the years 1915 or 1916 and got any oil, or demanded any oil from anyone here?

A. I can remember time and again that they were turned away from the dock down there.

Q. Don't you know that in 1915 and 1916 those boats were being operated out of the town of Ketchikan, engaged in the fish business between Ketchikan and Seattle in those two years?

A. Yes, and out here on the Sound, via Juneau.

Q. How?

A. They fished out here in the Gulf of Alaska and came via Juneau.

Q. Do you remember any specific instance in 1915 and 1916 that you could have sold the "King & Winge" or the "Scandia" one ounce of oil?

A. Yes, sir,

Q. You do? A. Yes, sir.

Q. What date?

A. I don't know. I have turned them away time and again.

(Testimony of J. C. McBride.)

Q. With whom did you have any conversation with?

A. With the captain of the boats. They called at our dock.

Q. Who was the captain of the boats?

A. I don't know their names.

Q. You are positive that they called at your dock in 1915 and 1916 and wanted oil? A. Yes, sir.

Q. Don't you know as a matter of fact that neither one of those [210] boats was ever in this port during the years 1915 and 1916?

A. No, sir; no such thing.

Q. Don't you know that in the year 1917, when you claim that you had a conversation with somebody about selling them oil, that they had a contract with the Standard Oil Company for that year and that they bought every ounce of their oil from the Standard Oil Company?

A. Yes; and I can show you on our books where I sold them oil and they wanted more, and I can show you—

Q. (Interrupting.) Well, I asked you. Who wanted more? Who was it? A. These boats.

Q. Who? A. I don't know the captain's name.

Q. You know the date? A. No; I don't.

Q. You don't know when?

A. Yes, I do—the years. And I can recall—

Q. (Interrupting.) Will you swear that those three boats, the "King & Winge" and the "Scandia" and the other one were up here and demanded oil in 1915 and in 1916 and 1917? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. How many times you don't remember?

A. No, sir.

Q. The dates you don't remember? A. No, sir.

Q. The man who made the demand you don't remember?

A. I don't remember the captain's name.

Q. And you don't remember the gallons they asked for?

A. Well, I do, practically each time. [211]

Q. Practically. Did you set it down in writing, or do you depend on your memory?

A. I'm depending on my memory.

Q. Depending on your memory? A. Yes.

Q. The National Independent Fisheries Company is still in business in Juneau, isn't it?

A. I don't know.

Q. Do you know whether or not the Union Oil Company had a station for oil during the years of 1915 and 1916 in Ketchikan?

A. I wouldn't say what year. I know they had a station there, but I wouldn't say what year.

Q. Well, now they had a station down there at Ketchikan at the same time that you had your station here for the Union Oil Company?

A. Yes; they did. I don't know whether it was the same years, but they had a station there.

Q. And you want to state that they were trying to get oil from the Union Oil Company's dock here in 1915 and 1916, and was getting all their oil either at Ketchikan during those years or from the Standard Oil Company?

(Testimony of J. C. McBride.)

A. I don't know what they did at Ketchikan. I'm just telling you what they did here.

Q. Do you remember in 1915 and 1916 what month it was that they ever called in here to get any oil? A. No, sir.

Q. Couldn't give the month? A. No, sir.

Q. Never made any memoranda of it at all? [212]

A. No, sir. Several different times those boats came in.

Q. You made up this bill of particulars in 1922, less than a year ago, didn't you?

A. It is just a year ago this month that I made it out.

Q. You made it up with the assistance of Mr. Roden, attorney in the case, too? A. No, sir.

Q. Just made it up yourself?

A. I had Naud's time for a little while, but I made it up practically myself; yes, sir.

Q. Made it from memory?

A. Memory and orders that I had.

Q. What kind of oil was it you were to sell to the "King & Winge" during the years of 1915, 1916 and 1917? A. Refined and lubricating oil.

Q. With whom did you have any conversation that you furnished them, or were to furnish them with these respective amounts of oil for the years 1915, 1916 and 1917? A. With the captain—

Q. (Interrupting.) 20,000 gallons each one of those years of refined oil and 1,000 gallons of lubricating oil. With whom did you have those conversations?

(Testimony of J. C. McBride.)

A. With the captain of the boat.

Q. You don't know who the captain was and can't recall his name?

A. I don't recall his name right now.

Q. He was going to take it on board all at one time? A. No, sir.

Q. He wasn't going to do that? A. No, sir.

Q. Now, these various corporations that I have just gone over [213] with you, which are enumerated in your bill of particulars, were they to pay cash or buy the oil on time?

A. It was the regular business terms—on time.

Q. What do you mean? What terms are regular business terms? A. Thirty or sixty days.

Q. Well, in your conversations with them, did you agree to give them thirty or sixty or ninety days' time, or whatever it was that you—

A. (Interrupting.) With the cannerymen I never had any understanding. They would come in and get the goods and they might pay cash then and then again they might not pay until the end of the year. That is what I have carried over into the next year.

Q. The next item is the Pacific-American Fisheries, and your bill of particulars shows— Well, I'll not refer to. Can you remember now, without looking at the bill of particulars, how much refined and lubricating oils and what years you were to furnish them in—the quantity and quality?

A. 30,000 gallons.

(Testimony of J. C. McBride.)

Q. You have gone over the bill of particulars quite frequently, Mr. McBride, so you can remember the amounts from memory, have you?

A. I haven't gone over this bill of particulars so often.

Q. With whom did you have any conversation about furnishing the Pacific-American Fisheries Company this 30,000 gallons of refined oil during the years of 1915, 1916 and 1917, and during each year 1500 gallons of refined oil?

A. That was with Mr. Forbes and his superintendent, Mr. Ryan.

Q. Where was it you had this conversation?

A. Here in Juneau and in Seattle. [214]

Q. Where was the first conversation you had with Mr. Forbes?

A. I went into the matter with Mr. Forbes the same as I did with all the other cannerymen, in 1914, regarding the handling of oil.

Q. Mr. Forbes told you in 1914 that he would, for the years 1915, 1916 and 1917, take of you 10,000 gallons of refined oil for each of those years and 1500 gallons of lubricating oil, did he?

A. Well, now, Mr. Ryan—

Q. (Interrupting.) Well, now, did Mr. Forbes tell you that? A. Well, I want to explain that.

The COURT.—You can answer yes or no and then make your explanation.

A. Because—

Q. I don't want "because."

(Testimony of J. C. McBride.)

The COURT.—Just wait a moment. Let him explain.

A. I want to explain these figures. During that time, some time—I don't recall just when it was—Mr. Forbes dropped dead and then Mr. Ryan took his place, so as I recall it now it was with Mr. Forbes and Mr. Ryan. I just wanted to make my statement plain; that was all. And I don't know what year it was that Forbes died.

Q. But you did have a conversation with Mr. Forbes in 1915, in which conversation he said to you, "Well, Jack, I'll take from you, for the Pacific-American Fisheries Company, for the years of 1915, 1916 and 1917, the different items or products" mentioned in the bill of particulars?

A. Yes, sir.

Q. You had that in 1914, that conversation?

A. Yes, sir. [215]

Q. You don't remember what year Mr. Forbes died? A. No; I don't.

Q. Where did you have any conversation with Mr. Ryan? A. Here in Juneau.

Q. When was that?

A. Well, it would be before Mr. Ryan went below, because Ryan lived in California.

Q. Well, before he went below in 1915, 1916 and 1917?

A. 1916 and 1917, he was superintendent out there.

Q. At what cannery? A. Excursion Inlet.

Q. What years?

(Testimony of J. C. McBride.)

A. Well, I always—I don't know whether he was called—Forbes was general manager and Ryan had been with him for a number of years, but I don't know what years, or just what he was called.

Q. Mr. Forbes was the general manager of all the canneries of the Pacific-American Fisheries that were in Alaska at that time?

A. That is, later he was.

Q. Later.

A. But originally Mr. Forbes was superintendent here in Alaska of the cannery at Excursion Inlet.

Q. Was he just superintendent of the Excursion Inlet cannery at the time that you had this conversation with him in 1914? A. Yes.

Q. Do you know when he ceased to be superintendent of that cannery later and became general superintendent or general manager of the Pacific-American Fisheries Company's canneries in Alaska? [216] A. No, I don't remember.

Q. In and during what years was Mr. Ryan superintendent at Excursion Inlet?

A. I think it was in 1916 and 1917.

Q. You reminded Mr. Ryan of the fact that Mr. Forbes had agreed to take this amount of oil for the years 1915, 1916 and 1917, did you, Mr. McBride? A. Yes, sir.

Q. And he said, "All right"?

A. Yes, sir.

Q. You didn't furnish that amount to him, did you? A. No, sir.

Q. Where is Ryan, do you know?

(Testimony of J. C. McBride.)

A. No; I don't.

Q. You are sure he was superintendent of the Excursion Inlet cannery for the years of 1916 and 1917? A. Yes, sir.

Q. Where was it you had this conversation with him, Mr. McBride? A. Here in Juneau.

Q. How many conversations did you have with him?

A. I don't recall the number of conversations.

Q. Well, when was any particular conversation that you had with him in Juneau?

A. During one of his business trips in here,

Q. You remember what month, what year?

A. No, sir.

Q. You don't remember the month of the year, time nor place that you had any conversations with Mr. Ryan? (No response.) [217]

Q. Don't you know that during these years, 1915, 1916 and 1917, the Pacific-American Fisheries Company had a contract with the Standard Oil Company for its oil? A. No, sir.

Q. You don't know that. That is, you don't know anything about that? A. No, sir.

Q. Do you know a man named Archie Shiels?

A. Yes, sir.

Q. Was Archie Shiels with the Pacific-American Fisheries during the years of 1915, 1916 and 1917?

A. Yes, sir.

Q. In what capacity, do you know?

A. He was assistant to Mr. Forbes, and then when Mr. Forbes died he took Mr. Forbes' place,

(Testimony of J. C. McBride.)¹

which made him the general manager of the company.

Q. In fact, he took the position of general manager of the business of the Pacific-American Fisheries Company in Alaska and succeeded Mr. Forbes.

A. Yes, sir.

Q. After Forbes' death? A. Yes, sir.

Q. And Mr. Shiels is still with the Pacific-American Fisheries Company, isn't he?

A. He is now the manager of the whole company, He's advanced since then, too.

Q. Was Mr. Shiels, during the years 1915, 1916 and 1917, in the office of the company at Bellingham, where his headquarters is, or was he up here?

A. His office was in Bellingham. [218]

Q. Mr. Shiels, during those years, had charge of the clerical work, contract business, and so forth, to a large extent, of the Pacific-American Fisheries, didn't he?

A. I don't know what his business was.

Q. You don't know in what capacity he acted in. Did you ever have any conversation with Mr. Shiels after he succeeded Mr. Forbes, concerning the furnishing of the Pacific-American Fisheries with any oil? A. No, sir.

Q. This oil, Mr. McBride, that you speak of here, as refined oil for the years 1915 and 1916, do you mean that that was the cheap grade of oil, being ten cents a gallon during 1915?

A. Distillate; yes, sir.

(Testimony of J. C. McBride.)

Q. That was about the cheapest grade, wasn't it, of what you term—

A. (Interrupting.) That's the cheapest refined oil—distillate.

Q. The next item in the bill of particulars is James Davis, in which you claim that you were to furnish him, during the years 1915, 1916 and 1917, a certain amount of refined oil and a certain amount of lubricating oil. Do you remember the amounts there without examining the bill of particulars? Or don't you?

A. It's fifteen thousand gallons.

Q. What kind? A. Of refined oil.

Q. How much lubricating oil? A. 750 gallons.

Q. What conversation did you have, if any, with Mr. Davis about this matter of furnishing oil?

A. It was a conversation to sell him oils. [219]

Q. What year was it that he told you that he would take this amount of oil from you?

A. 1915.

Q. What time in 1915?

A. In the early part of the year.

Q. You know what month, Mr. McBride?

A. No, sir.

Q. Couldn't tell whether it was January, February, March, April or May? A. No, sir.

Q. Where was Mr. Davis at the time that you had this conversation with him?

A. I don't know just the exact place.

Q. Did you just have one conversation with him

(Testimony of J. C. McBride.)

about the amount of oil that you were to furnish him—

A. (Interrupting.) No; I talked to him—

Q. (Continuing.) For these three years?

A. I talked to him several times about it.

Q. You remember how many times?

A. No, sir.

Q. How did it come, Mr. McBride, that, for instance, Davis, the Taku Canning and Cold Storage Company, the Chichagoff Mining Co., the Hoonah Packing Co. and the National Independent Fisheries Company, the Pacific-American Fisheries Company, that they were to have a given quantity of lubricating oil and a given quantity of refined oil for each of the years of 1915, 1916 and 1917?

A. I don't know how they arrived at that, Judge.

Q. What boat or boats did each of those have in 1915, 1916 and 1917—no; what boat did James Davis have? [220]

A. He run the mail boat.

Q. What mail boat? A. The "Estebeth."

Q. In those years?

A. No; he had the, the one before, I have forgotten the name of the boat he had before the "Estebeth."

Q. You forget the name of the boat. Where did he run it? A. Out of Juneau.

Q. From where to where and return?

A. Skagway and Sitka.

Q. You forgot the name of the boat?

A. I don't recall it just this minute.

(Testimony of J. C. McBride.)

Q. Were you ever present personally, yourself, when James Davis called for oil himself and you couldn't furnish him with any oil?

A. On our dock?

Q. I said, were you ever personally present when he called with his boat during either the years 1915, 1916 or 1917, when he called for oil, with his boat, at your dock and couldn't get it? A. No, sir.

Q. You don't know of your own personal knowledge of any amount of oil that James Davis called to get from the Union Oil Company that he didn't get, during either one of those years, do you?

A. It was reported to me that he called.

Q. Oh; it was reported to you. Mr. McBride, do you think it is possible for you or any one else, to have, in 1914 or in 1915, to have made an estimate as to just how much oil the Hoonah Packing Co. at Hoonah or at Gambier Bay, or the Taku [221] Canning & Cold Storage Co., or the Chichagoff Mining Co., or the Auk Bay Salmon Company or the National Independent Fisheries would need for either one of those years?

A. You mean, could I make it?

Q. Yes. A. No.

Q. Well, do you think it is possible for cannerymen to make that estimation as to how much oil they would need for two years ahead, or three years ahead? A. Yes, sir.

Q. You think it is? A. Yes, sir.

Q. You think that a canneryman would know

(Testimony of J. C. McBride.)

now three years from to-day just what oil he was going to use in 1916, do you, at a cannery in Alaska?

A. Yes, sir.

The COURT.—In 1916?

Q. 1926. Do these canneries, and have they been, to your knowledge extending over any length of time, running the same crew of men and the same boats, burning the same amount of oil and catching the same amount of fish each year?

A. I don't know that catching the same amount of fish or running the same crew would come into it, Judge. They might spend the same amount on oil and not get half the fish.

Q. But you say that you couldn't, or do you know whether a canneryman could estimate three years ahead of time as to how much oil he was going to use the third year? A. I think he could.

Q. You think he could? A. Yes, sir. [222]

Q. How many of these canneries, Mr. McBride, have gone out of business and gone into bankruptcy, to your knowledge, inside of the first year or the second year that they have ever done business?

Mr. FAULKNER.—Just a minute. We object to that as incompetent, irrelevant and immaterial and not cross-examination. We're running off into a field not covered by the pleadings now.

Judge WINN.—Getting at this to show the unreasonableness of it.

Mr. FAULKNER.—Well, it's getting at the estimate in an argumentative way. I think it is rather arguing with the witness.

(Testimony of J. C. McBride.)

The COURT.—He may answer.

(Question repeated by reporter.)

A. That is the question you asked me when you asked me if they could determine the number of gallons they could use three years ahead. You asked me if they are in operation three years hence how many gallons they could use?

Q. What I want to find out, Mr. McBride, is can any one of these canneries, with any degree of certainty, estimate as to whether or not they would be running three years hence from any particular day.

Mr. FAULKNER.—I object to that as purely argumentative.

The COURT.—Objection sustained.

Q. Isn't it a fact, Mr. McBride, that during the war and during the years of 1916 and 1917, that the canneries cut down their packs and cut down the boats that they were using, and that some ran at about half and some a third capacity of what they had been running before? Don't you know that [223] to be a fact?

A. No, sir; I don't. They fished harder than they ever fished before.

Q. Don't you know that the canneries, on account of war time prices and the lack of catch, most all of them now are pretty hard up financially, and that a lot of them have gone out of business, and during the years 1916 and 1917, went out of business?

Mr. FAULKNER.—I object to that as argumentative and not cross-examination.

(Testimony of J. C. McBride.)

The COURT.—Objection sustained.

Q. Do you want to say that the Hoonah Packing Co., the Taku cannery, the Auk Bay cannery, the Pacific-American Fisheries and so on, at their respective locations, that you have testified to, run the same number of boats, used the same amount of gasoline or wouldn't have used the same amount of gasoline for each of the years of 1915, 1916 and 1917?

Q. I'm not saying what those canneries used. In my bill of particulars, I'm stating what these gentlemen agreed to give me orders for. I'm not stating—

Q. (Interrupting.) You don't know whether they would need it or not and that didn't concern you, whether they ran at the same capacity and so on, or how much oil they needed, except what they told you? A. No; I didn't know, but they—

Q. (Interrupting.) Now, Mr. McBride, don't you know that during the years 1916 and 1917 that the canneries did not run at full blast and did not use the same amount of gasoline and oil that they did, say, in 1914? [224]

A. I think that they fished harder then than they ever did in their life.

Q. You think they had more boats and more men during those years? A. Yes.

Q. Huh?

A. No; I won't say about the number of men and boats. I think, perhaps that they made further runs.

Q. You don't know whether they did or not?

(Testimony of J. C. McBride.)

A. I don't know a thing about their business.

Q. Were you up here much during the years 1915, 1916 and 1917?

A. Yes, sir; I was here all the time.

Q. Do you pretend to state to the jury and to the Court that you didn't know the condition of affairs of these canneries that you set forth in your bill of particulars, as to how they were outfitting for business during those years?

A. I have just stated in my bill of particulars what they told me.

Q. Do you know of your own personal knowledge that they were running at the same capacity and the same boats and the same number of men during those years, 1915, 1916 and 1917?

A. No, sir; I do not.

Q. As a matter of fact you know that they were not, don't you, Jack? A. No; I don't.

Q. Didn't you keep up with that industry in Alaska here, when you were selling them oil, hardware and so forth, any better than that?

(No response.)

Q. This amount that you were to furnish James Davis, 15,000 [225] gallons a year, that I have mentioned, of one kind of oil and 750 of the other kind, was that to constitute his entire requirements for those years?

A. That I couldn't tell you.

Q. Did he come to you and tell you that if you had that oil he would take it?

A. I went to him to solicit his business.

(Testimony of J. C. McBride.)

Q. The personal solicitation took place in 1914?

A. I think it was in 1915. He was here all the time.

Q. You don't know what time in that year?

A. No; I do not.

Q. Well, here's Hunter & Dickinson, you have got the same number of gallons of refined oil, 5,000 gallons, for each of those years, 1915, 1916 and 1917, and 250 gallons of lubricating oil for the same years, the same amount. Was Hunter & Dickinson running the same gasoline boats each one of those years?

A. I don't recall. They had two or three boats. I don't recall just how many they had.

Q. What did they run in 1915, do you know?

A. I do not.

Q. In 1916? A. No, sir.

Q. 1917? A. No, sir.

Q. Don't you know that they did change boats and didn't run the same boats in any two out of those three years? A. No; I don't.

Q. Notwithstanding that, they came to you and told you that they wanted these amounts of oil for those years? [226]

A. No; I solicited that business.

Q. Well, you went to them and then they told you that they wanted that amount? A. Yes, sir.

Q. Contracted three years ahead of time, did they? A. Yes, sir.

Q. And now the launch "Rolfe." You have 2,000 gallons for each of the years 1915, 1916 and

(Testimony of J. C. McBride.)

1917 of refined oil and a hundred gallons for each of those same years of lubricating oil. With whom did you have a conversation concerning the furnishing of this oil to the launch "Rolfe"?

A. Oswald Olson.

Q. Where is he? A. He is here in Alaska.

Q. Here in Alaska. Is he in town?

A. No; he may be in Ketchikan.

Q. Hunter and Dickinson are in town, are they?

A. Yes, sir. My conversation was with Earle Hunter.

Q. You are sure that this man that you speak of, Olson, the owner of the launch "Rolfe," ran and operated that boat during the years of 1915, 1916 and 1917? A. Did he run it? Yes, sir.

Q. Those three years? A. Yes, sir.

Q. Where did she run?

A. She fished between Ketchikan and the deep sea fisheries.

Q. Where is the deep sea fisheries?

A. In the Gulf of Alaska. And came in here many trips via Juneau.

Q. He would come in here on some of his trips?
[227]

A. Yes, and sold fish here, too.

Q. Are you sure they fished those three years? A. Yes, sir.

Q. You think he is here in town now—the owner of the "Rolfe"?

A. No; I think he is in Ketchikan.

(Testimony of J. C. McBride.)

Q. He was fishing and furnishing his boat out near Ketchikan?

A. I don't know where he furnished it down there.

Q. So Olson told you— In what year was it that you had this conversation with him? A. 1915.

Q. He told you in 1915 that he was going to need these respective amounts of oil?

A. That he would take that much oil from me; yes, sir.

Q. And he contracted three years ahead of time?

A. Yes, sir.

Q. You considered that a good, profitable contract, did you?

A. Why, yes, in the aggregate, if I could furnish the oil; yes, sir.

Q. Well, all these agreements, contracts or promises of whatever nature, whatever you may term them, they're all oral, that you had with these parties; all oral,—James Davis, Hunter & Dickinson and the man on the "Rolfe"?

A. Yes; those were oral; yes, sir.

Q. Now, comes the launch "Tillicum." How much did she want in the years 1915, 1916 and 1917?

A. A thousand gallons.

Q. Who was the owner of her?

A. James Christoe.

Q. With whom did you have a conversation about furnishing her with gas and so forth for each of the years 1915, 1916 and 1917? [228]

A. Mr. Christoe.

(Testimony of J. C. McBride.)

Q. Jim Christoe. He came to you or did you go to him? A. I solicited his business.

Q. When did he tell you this?

A. Oh, it was here in town.

Q. When? A. Oh, when?

Q. Yes. A. 1915.

Q. How? A. In 1915.

Q. What time in 1915?

A. Early in the spring.

Q. What month, do you remember? A. No, sir.

Q. Jim Christoe was the owner of the boat "Tillacum"? A. Yes, sir.

Q. He is over at Douglas now, isn't he?

A. Yes, sir.

Q. In the Territorial Bank there? A. Yes, sir.

Q. You just had this one conversation with him about furnishing him with refined and lubricating oils for the year of 1915? A. Yes.

Q. And in 1916 and 1917. Just the one conversation. So he calculated three years ahead of time, did he? A. Yes, sir.

Q. Now comes the "Anita Phillips." Who owned her during the years of 1915 and 1916?

A. Jack Rowe. [229]

Q. And 1917. Jack who? A. Rowe.

Q. When did you have any conversation with Jack Rowe about furnishing her with refined or lubricating oils? A. 1915.

Q. When and where?

A. I don't know what month. Here in Juneau.

Q. Don't remember the month. Did he own the

(Testimony of J. C. McBride.)

“Anita Phillips” for all those three years, 1915, 1916 and 1917?

A. I don't know that he owned her. He run her.

Q. You are sure he run her for those three years?

A. Yes, sir.

Q. How is that? A. Yes, sir.

Q. Did you solicit his business or did he come to you? A. I solicited his business.

Q. And he said, “All right, Jack, I'll take this amount of oil”? A. Yes, sir.

Q. For the next three years? A. Yes, sir.

Q. How much oil was it, do you remember that without looking at the bill of particulars?

A. Well, I don't know. I don't just remember how much it was.

Q. Had no memoranda made in your office, did you?

A. In the office of C. W. Young Company? No.

Q. You did remember it when you made up the bill of particulars, didn't you? A. Yes, sir.

[230]

Q. In 1922. But now, can't you tell the month that you agreed to furnish him?

A. I just read it a moment ago. Right at this minute, I don't remember the month; no, sir.

Q. Well, here's Pete Madsen, for the years of 1915, 1916 and 1917, did you furnish a certain amount—that is, you say you agreed to furnish a certain amount of refined and lubricating oils to him, amounting to the same amount each year, 1915, 1916 and 1917. A. Yes, sir.

(Testimony of J. C. McBride.)

Q. Where did you have any conversation with Pete about this? A. Here in Juneau.

Q. When was that? A. That was in 1915.

Q. What time in 1915?

A. Early in the spring.

Q. What month?

A. I couldn't tell you the month.

Q. Early in the spring. Now, Pete owned the gasoline boat "Hegg," didn't he?

A. I believe it was the "Hegg"; yes, sir.

Q. So he calculated that he would need how much oil for each one of those years, refined oil, do you remember without looking at the bill of particulars?

A. I don't remember right now; no, sir.

Q. Well, you have it in your bill of particulars that he was to have 3,000 gallons for each one of those years of one kind— A. No; 2,500 gallons.

Q. 2,500 gallons for each of the years 1915, 1916 and 1917 of [231] refined oil, and in each one of those years 125 gallons of lubricating oil. So Pete estimated here, for three years ahead, that he would need that much of those kinds of products, did he?

A. Yes, sir.

Q. The next is the "Morangen." Do you remember, Jack, without looking at the bill of particulars, what your sales were to be or what your conversation was as to the amount of gallons that anybody agreed to take for that gasoline boat?

A. No, I don't, right this minute.

(Testimony of J. C. McBride.)

Q. Who was the man that you had your conversation with on that? A. Pete Fleming.

Q. Who? A. Pete Flemming.

Q. Where is Pete? A. I think he is in Juneau.

Q. Then Pete estimated ahead for three years and wanted an exact amount of gasoline and lubricating oils for each of those three years, did he?

A. I don't know that he estimated it. That is what he told me; what business he would do with me.

Q. Well, he said he would take that much?

A. Yes, sir.

Q. Of oil. A. Yes, sir.

Q. The "Gypsy," who owned her?

A. I don't remember the Captain's name.

Q. You remember the amount that you claimed you could furnish the "Gypsy"?

A. Oh, a couple of hundred gallons. [232]

Q. Yes; and ten gallons each of the lubricating oil for each of the years of 1915, 1916 and 1917. Do you know the man?

A. I can't recall the captain's name right now.

Q. Where was it you had this conversation?

A. Here in Juneau.

Q. In 1915? A. Yes, sir.

Q. Do you remember what time in 1915?

A. Early in the spring.

Q. You don't remember the month?

A. No, I don't.

Q. You don't know whether it was January, February or March. A. No, sir.

(Testimony of J. C. McBride.)

Q. His conversation with you was that he would take the same amount of each one of those oils for each one of those respective years that I have mentioned? A. Yes, sir.

Q. The launch "Pacific," was that owned by Tibbits? A. Yes, sir.

Q. During those years. You remember, without looking at the bill of particulars, the amount of refined oil and the amount of lubricating oil that you were to furnish each one of those years?

A. No, I don't right offhand.

Q. Where was Tibbits when you had this conversation with him? A. In Juneau.

Q. At what place, do you remember?

A. No, I don't.

Q. What did he say to you and what did you say to him?

A. He said that he would take that number of gallons of oil. [233]

Q. Just had the one conversation?

A. I think I had several with the captain.

Q. Well, in the first conversation did he define the amount that he wanted for each one of those three years, or did you take all the conversations together to arrive at the conclusion that you set forth in the bill of particulars to the effect that he wanted 5,000 gallons for each one of the years of one kind and 250 of the other kind? Was it one conversation or two that you had?

A. Of course, it was the last conversation that he told me in.

Q. The last one? A. Yes.

(Testimony of J. C. McBride.)

Q. When was the last one? A. I don't know.

Q. Do you know what year? A. 1915.

Q. What time?

A. I don't know what time of the year.

Q. Do you know what month? A. No.

Q. Well, the next two are the launch "Olga" and the launch "Orien"; do you remember the respective amounts of oil that you were to furnish them during the years of 1915, 1916 and 1917?

A. No; and I don't recall the captain's name right now.

Q. Do you remember the amount of oil that each of those boats was to get now? A. No.

Q. You don't remember the captains of either the launch "Olga" or the "Orien"?

A. Not right now; no. [234]

Q. Where was it that you had the conversation with the captain of the "Olga"? A. In Juneau.

Q. You don't remember who it was?

A. No, I don't.

Q. That conversation was in 1915?

A. Yes, sir.

Q. In which part of the year?

A. Early in the year.

Q. How? A. Early in the year.

Q. As early as January, or February of the year, was it?

A. No, I don't think it was that early. It might have been in March.

Q. It might have been in March, 1915?

A. Yes, sir.

(Testimony of J. C. McBride.)

Q. With the man on the "Olga" you just had one conversation?

A. Yes, sir; one conversation with him.

Q. What sort of looking man was he?

A. I don't remember the captain's name right now.

Q. What size of man, what age, do you remember that now? A. I couldn't tell you that now.

Q. Do you remember what place it was you had this conversation? A. No.

Q. Don't you remember anything about it? Did you make the same answer in regard to the launch "Orien"? A. Yes, sir.

Q. Because you have got the same amount, 2,500 gallons of refined oil and the same amount of lubricating oil? A. Yes, sir. [235]

Q. You don't remember who the captain was on that? A. No, sir.

Q. You don't remember how he looked?

A. No, sir.

Q. You remember the place you had the conversation with him? A. No.

Q. Where did that boat run to?

A. It was a fishing boat out of here.

Q. Was the "Olga" also a fishing boat? —

A. Yes, sir.

Q. Do you know of your own knowledge if those two boats remained here during the years 1915, 1916 and 1917? A. Yes, sir.

Q. You know if the same captain remained captain of them?

A. I don't know that, but this boat was here.

(Testimony of J. C. McBride.)

Q. Of course the records in your office down there would show? A. Yes, sir.

Q. Whether they remained here or not and who owned them.

A. Yes, sir; gives the captain's name, the owner's name and everything.

Q. Do you remember of your own personal knowledge, Jack, as to those boats remaining here at Juneau; that is, those two large boats just mentioned, or did you ascertain from examining the records in your office?

A. I remember their being here as fishing boats.

Q. There is another launch, called the "Carita."

A. "Carita."

Q. Do you remember, without looking at your bill of particulars, how much you were to furnish her of refined oil and how much of lubricating oil for the years 1915, 1916 and 1917? [236]

A. Well, she was quite a size boat. No; I don't remember. Some 4,000 gallons probably, or about that.

Q. Who was the captain during those years, Jack?

A. She belonged to the lumber company here.

Q. Belonged to the sawmill? A. Yes, sir.

Q. Who did you talk with? A. Mr. Worthen.

Q. Mr. Worthen; who was he?

A. He was the manager and owner.

Q. Of the sawmill? A. Yes, sir.

Q. He's dead, isn't he? A. Yes.

Q. Do you know when he died?

A. No, I don't.

(Testimony of J. C. McBride.)

Q. You had this conversation with Worthen in what year? A. 1915.

Q. When and where?

A. In Juneau, in the early part of the year.

Q. You don't remember the month?

A. No, sir.

Q. So he told you that if you could furnish him with this kind of oil for those three years, he would take that amount from you? A. Yes, sir.

Q. Contracted for three years? A. Yes, sir.

Q. This conversation was for the three years' requirements? A. Yes. [237]

Q. Sawmill has been a kind of an up-and-down business, running some time full blast and sometimes closing. Hasn't been a regular, going concern, or wasn't, during 1915, 1916 and 1917?

A. I think they run continually during the summer time.

Q. Sure of that? A. Yes, sir.

Q. While Worthen was there? A. Yes, sir.

Q. Those three years? A. Yes, sir.

Q. Scandinavian Grocery. What were they engaged in, the grocery business here?

A. Grocery business; yes, sir.

Q. With whom did you have any conversation concerning the furnishing of that concern?

A. The owner; Mr. Randall.

Q. When did you have that conversation, Jack?

A. In 1915 or 1916.

Q. 1915, did you say? A. And 1916.

(Testimony of J. C. McBride.)

Q. Do you remember that it was both of those years? A. Yes, sir.

Q. Do you remember without looking at the bill of particulars how much oil you were to furnish him?

A. I think in 1915 there was 15,000 gallons and in 1916 they gave me an order for 61,000 gallons.

Q. What do you mean by giving you an order?

A. They sent me an order.

Q. Written order? A. Yes, sir. [238]

Q. Is that one of the papers that have been offered in this case? A. Yes.

Q. Defendant's Exhibit "P." Who signed that order, Jack? A. Randall.

Q. Is there any other name there?

A. Scandinavian Grocery.

Q. Do you remember the date that that was deposited in your office?

A. No; I don't remember the exact date.

Q. I see on this exhibit that it is marked "Copy." What does that mean? A. Where?

Q. Over there (indicating) in that corner. It's marked copy.

A. I don't know. It is no doings of mine.

Q. When do you first remember having seen that?

A. Well, the date is on it; January, 1916.

Q. Well, I know the date is on it, but when do you remember having received it at the office of the C. W. Young Company?

A. During that month.

(Testimony of J. C. McBride.)

Q. This was January, 1916. You didn't take any pains to look this up until you went to make up the bill of particulars in this case in 1922, and then you looked it up and found this order?

A. Yes, sir.

Q. How much of the oil here did the Scandinavian Grocery Company get under this order?

A. Didn't get any.

Q. You never saw this order signed?

A. No, sir. [239]

Q. When was the first time you ever saw it in your office, in the office of the C. W. Young Company? A. In January, 1916.

Q. You remember it that far, do you?

A. What is that?

Q. You remember seeing this before. You remember it back that far?

A. It is dated then; it must be since then.

Q. But personally you don't remember having seen it in your office until you went out to make your bill of particulars?

A. Yes; I remember the order.

Q. You remember the order? A. Yes, sir.

Q. You remember the details of the C. W. Young Company's business that well during that period so you can remember a particular order given in 1916?

A. Well, if that's— That is not particularly a detail matter; that's a nice order.

Q. Well, you was seeing a whole lot of orders during those years—

A. (Interposing.) Yes, sir.

(Testimony of J. C. McBride.)

Q. (Continuing.) Weren't you, for gasoline?

A. Yes, sir.

Q. This is witnessed by a man named Wolfe. Who is Wolfe, do you know?

A. He is a representative of the Union Oil Company.

Q. Mr. Wolfe was here and procured that order, didn't he, from the Scandinavian Grocery Company?

A. It was on their stationery; yes, sir.

Q. There were some deliveries made under this contract and [240] agreement? A. No, sir.

Q. None at all? A. No, sir.

Q. Let's see. Your bill of particulars states that this was for 1915. Were you to receive cash for it with the order or to sell him on time?

A. This says "Cash."

Q. It was to be for cash?

A. This says "Cash" on there; yes, sir.

Q. You know what time Randle left the country and what time his concern went into bankruptcy down there? A. No, sir; I don't.

Q. He did leave the country, though, and his grocery store went into bankruptcy down there, didn't it?

A. Yes; but I don't know when it was.

Q. You don't know whether or not if you had had the oil here and delivered it, whether he could have paid for it?

A. Well, his order called for cash.

(Testimony of J. C. McBride.)

Q. But you don't know of your own personal knowledge whether he had the cash on hand or not?

Mr. FAULKNER.—Just a minute, we object to that as not proper cross-examination and incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Q. Now, in this order here, he says, in one column, "Estimated yearly consumption." What do you understand by that? How much lubricating oil and how much refined oil was to be delivered under that, according to your construction of the order and for what years? It says, "Estimated yearly amount." [241]

A. Well, I would construe this as meaning that he wanted 2500 gallons of gasoline in 1916 and 60,000 gallons of distillate in the same year.

Q. What in the world was he going to do with all that? A. I don't know.

Q. But the column that indicates that, there is nothing there or in the bill itself to indicate that except that that is the "estimated yearly consumption."

A. Wolfe made it out. He evidently knew what he was doing. He was a representative of the Union Oil Company from Seattle. That's one of their salesmen, by the way.

Q. Was Randle running a big gasoline boat, or was he engaged in the grocery business?

A. I don't know.

Q. Wasn't in the fish business, was he?

A. I don't know.

(Testimony of J. C. McBride.)

Q. Never had any boat, to your recollection, did he? A. I don't remember.

Q. If he contracted for any such amount as that, he contracted as a subagent to use it in his grocery store?

A. I don't know. That is the order I got.

Q. And Wolfe brought it to you? A. Yes, sir.

Q. He run the same store down there where the Scandinavian Grocery Store is there now, down this side of the sawmill, about at the City Dock, didn't he?

A. I don't know where his store was right now. Didn't he have two?

Q. You do know, Jack, that he wasn't in the gasoline boat business, though, don't you, during either 1915, 1916 or 1917? [242]

A. Not that I know of.

Q. He didn't have any gasoline boat to your knowledge? A. Not to my knowledge; no.

Q. No. Well, the next one is the launch "El Nido," for three years. You remember, without looking at the bill of particulars what amount of refined oil she was to take for 1915, 1916 and 1917 and what amount she was to have of lubricating oil for the same years?

A. I don't remember that offhand.

Q. Well, with whom did you have a conversation about furnishing her the amount—it's 1500 gallons of refined oil for each of those years, and 75 gallons of lubricating oil for each of those years.

(Testimony of J. C. McBride.)

Whom did you have any conversation with about that, Jack? A. A man by the name of Dodd.

Q. D-o-d-d (spells)? A. Yes.

Q. Who was Dodd?

A. He was the operator of the boat.

Q. Who owned it?

A. I don't know who owned it?

Q. Where was the boat being operated?

A. In the channel, around southeastern Alaska.

Q. Belonged to a cannery, didn't she? A. No.

Q. Don't you know that she belonged to the Lisianski Packing Company out here, where Cann's mines are?

A. Yes; she did later. I know that.

Q. Whom did she belong to in 1915, 1916 and 1917? A. I don't know the owner's name.

Q. You know that Dodd was the owner of her for those three years. [243]

A. He was operating her.

Q. For those three years? A. Yes, sir.

Q. For whom?

A. I don't know who owned her.

Q. You don't know whether she was engaged in the fish business independently or engaged in the fish business for some cannery.

A. No; I don't.

Q. You know where Little Port Walter and Big Port Walter are, don't you? A. Yes.

Q. Well, the Lisianski Packing Company had a cannery out up near those two places, did they not?

A. A cannery there?

(Testimony of J. C. McBride.)

Q. Yes; the Lisianski Packing Co.?

A. No; I don't know.

Q. Where did you have this conversation with Dodd? A. Here in Juneau.

Q. When? A. In 1915.

Q. And the conversation was to the effect that if you had the oil, he would take this amount of oil from you for those three years? A. Yes, sir.

Q. You don't know whether he was the owner of the boat or had any right to contract for her, or whatever become of Dodd, do you? A. No, sir.

Q. You know where that gas boat is now? [244]

A. She is in southeastern Alaska.

Q. Cann owns her, doesn't he?

A. I don't know.

Q. The Captain Cann I spoke of, owning the mines over on the Chichagoff Island?

A. I don't know.

Q. You don't know anything about her. You don't know that she belonged to the Lisianski Packing Co.? A. No, sir.

Q. And that Cann got her off of the Lisianski Packing Company? A. No, sir.

Q. You don't know anything about it?

A. No, sir.

Q. Jack Campbell owned the "Chlopeck"?

A. Yes, sir.

Q. Where did you have this conversation with Jack about furnishing refined oils and lubricating oils for 1915, 1916 and 1917? A. In Juneau.

(Testimony of J. C. McBride.)

Q. Where was Jack operating this craft during those years?

A. Well, he run her all over—just wherever he had a contract—Lituya Bay and southeastern Alaska.

Q. Kind of Jack the Tar, sea rover? A. Yes.

Q. During those years, how much of the time was he in Juneau, do you remember?

A. Well, he was in every once in a while.

Q. The amount that was to be furnished to him, according to your bill of particulars here, was 2500 gallons of refined oil [245] for each of the years 1915, 1916 and 1917, and 125 gallons for each of the same years of lubricating oil. What time was it you had any conversation with Jack?

A. 1915.

Q. That he was to take this amount of oil for those three years. A. Yes.

Q. Where? A. In Juneau.

Q. Do you remember the place?

A. And probably in the store again. He was in there, in the office.

Q. You don't remember particularly where you met him? A. No, sir.

Q. You don't remember the month?

A. No, sir.

Q. You solicited his business, and he said yes, if you had the oil he would take it from you?

A. Yes; he was always on the gridiron, down on the dock, repairing the boat when he was in.

(Testimony of J. C. McBride.)

Q. The "Chlopeck" passed most of her time on the gridiron, didn't she, Jack?

A. Yes; most of the time.

Q. She is an old scow, made over into a boat, that belonged down at Petersburg, to the Pacific-American—no, the O—— Canning Company down there. You know that old darn craft.

A. I don't know that she was made out of an old scow. I know that she is an old boat.

Q. In 1915 you couldn't hardly tell whether she would last three years or not, could you, Jack?

A. That, of course, was for Campbell to decide. He still has her. [246]

Q. So he contracted three years ahead of time for the same identical amount?

A. He said he would take that amount of oil if I would deliver it to him.

Q. Part of the time he was away out at Lituya Bay? A. Yes, sir.

Q. Did you know his brother, Captain Campbell?

A. Very well.

Q. Captain Campbell was on the "Chlopeck" with him? A. At one time; yes.

Q. Well, he and the captain owned the "Chlopeck" together, didn't they?

A. I don't know just about the ownership of it.

Q. Don't you know that during the years of 1915, 1916 and 1917, that they were out most of the time—away out in or near Lituya Bay, away up the coast, between here and Cordova?

(Testimony of J. C. McBride.)

A. I know they would run once in a while to Lituya Bay.

Q. You don't know whether it stayed out there for a whole year, once, do you, Jack?

A. No, sir.

Q. You don't know anything about her capacity or about how much oil she could take on at a time?

A. In her tanks?

Q. Yes, sir. A. No, sir.

Q. Was that oil all to be furnished at one time or in dribbles? A. Whenever he needed it.

Q. You didn't furnish any of it? A. No, sir.

Q. Mike Koski. You got him on the launch "Caesar"? [247] A. Yes, sir.

Q. You got him marked down here for 1500 gallons for each year of 1915, 1916 and 1917 for refined oil and for 75 gallons for each one of those years of lubricating oils. A. I suppose so.

Q. Where is Mike?

A. He is in Juneau, I think; lives here.

Q. Did he own the gas boat "Caesar" during those years?

A. I don't know if he owned it or not. He was operating her, I know that.

Q. Do you know whether he still continued to operate her in fifteen, sixteen and seventeen?

A. Yes, sir.

Q. You solicited his business and he told you yes, if you could furnish him oil, he would do it?

A. Yes, sir.

(Testimony of J. C. McBride.)

Q. He contracted for three years, did he?

A. Yes, sir.

Q. What is that (indicating), Rom or Ramm?

A. Ramm.

Q. Of the launch "Dolphin." How much do you remember was it that he was going to take?

A. I don't remember right now.

Q. Well, you have here in the bill of particulars, 3,000 gallons for 1915 and 3500 for each of the years 1916 and 1917, of refined oil, and 115 gallons of lubricating oil for 1915 and 175 gallons for each of the years of 1916 and 1917. You had that conversation with him about it, did you?

A. Yes, sir.

Q. In 1915? [248] A. Yes, sir.

Q. You remember what part of the year?

A. Early part.

Q. Do you remember what month? A. No, sir.

Q. He contracted or agreed to take that amount three years ahead, providing you had the oil for him?

A. Yes, sir.

Q. Who was at the head of the Pillar Bay Packing Company—that's the next one on the list—you remember who was at the head of that company during 19— A. (Interposing.) Mr. McHugh.

Q. You only have one year here? A. Yes, sir.

Q. 1916. You have 1650 gallons of refined oil. The lubricating oil is figured down to a fraction—82½ gallons. I think it is a half—a fraction anyway. With whom did you have that conversation?

(Testimony of J. C. McBride.)

A. I had an order for that.

Q. Huh? A. I had an order for that.

Q. Have you the order here? From whom did you have the order? A. From Mr.—

Q. (Interrupting.) Do you know who was at the head of the Pillar Bay Packing Company?

A. At that time?

Q. Yes. A. Mr. McHugh.

Q. Now, that is not the McCue that is with the Northwestern Fisheries Company? [249]

A. No, sir.

Q. Who used to be in partnership with McCormick at Wrangell. A. Yes.

Q. And their cannery is off from Wrangell somewhere. A. It's over on Kuiu Island.

Q. Yes. A. At the lower end.

Q. Yes; I have been there. Where did you have this conversation?

A. It was in the winter, I think I got that.

Q. An order? A. Yes.

Q. This isn't an order. If you have an order I fail to find it here.

The COURT.—Well, ask him if that is what he refers to.

Q. Is that it (handing paper to witness)?

A. This is the letter I wrote the Union Oil Company. That is not the order.

The COURT.—Has it been offered in evidence?

Mr. FAULKNER.—No; there was no order offered in evidence.

(Testimony of J. C. McBride.)

Q. Is this the paper that you had reference to as an order from that outfit?

A. No; that's an order. Oh, this is the letter, I wrote; yes.

Q. This is a letter that you wrote down to the Union Oil Company, is it? A. Yes.

Q. What do you mean by order? Was it in writing or oral?

A. Yes, sir; I had a written order for that.

Q. Where is it?

A. I don't know where it is. [250]

Q. You looked for it?

A. Yes, sir. That is the only memorandum that I can find there. Part of my files are missing.

Q. Do you know who delivered it to you? McHugh didn't deliver it to you personally, did he?

A. No; he didn't.

Q. Do you know who delivered it to you?

A. No, sir; I couldn't say.

Q. You don't know when it was delivered?

A. Not exactly; no.

Q. Well, do you remember in what year?

A. It was in 1916.

Q. You don't remember the month?

A. That letter probably would state.

Q. All that you remember about dates and so forth, is from this exhibit which I have just shown you, which is a letter that you wrote to the Union Oil Company? A. Yes, sir.

Q. You have no personal remembrance of who called on you with this order? A. No.

(Testimony of J. C. McBride.)

Q. Was that contract to extend over the entire year? A. No; it was just an order.

Q. Just simply a straight order? A. Yes, sir.

Q. You have searched the records of the C. W. Young Company's office and books and papers?

A. Yes, sir.

Q. And were unable to find any such written order? A. Yes, sir. [251]

The COURT.—Was the order ever filled?

The WITNESS.—No, sir.

The COURT.—Why?

The WITNESS.—I didn't have the oil.

Q. You don't know what became of the order?

A. No; I don't.

Q. What about the Tenakee Fisheries? Where was that concern located? A. In Tenakee.

Q. That is about what distance from Juneau?

A. Oh, approximately, I don't recall. I'm just trying to think.

Q. Well, let it go. Who was it that ordered this for the Tenakee Fisheries?

A. I don't remember who signed the order. It was from the Tenakee Fisheries.

Q. Did you have an order? A. Yes, sir.

Q. Well, you mean you had an order but it hadn't been offered in evidence?

A. That's all that I find in connection with that order—the letter that I wrote. I had that letter in my files.

Q. That is, this letter that I have just exhibited to you? A. Yes, sir.

Q. That you wrote to the Union Oil Company?

(Testimony of J. C. McBride.)

A. Yes, sir.

Q. If you ever had any written order, what became of it, do you know?

A. I have misplaced it. Most of my files of the Union Oil Company have been misplaced—going back and forth from the [252] oil company to the store.

Q. Do you remember back as far as 1915 and 1916 that there was a written order?

A. I take that order from the letter, Judge.

Q. Well, I know, but Jack, in your exhibit here, “Q,” is there anything to indicate in that letter that you had a written order for this amount of oil?

A. Yes.

Q. What indicates it to you that you had an order?

A. Well, I stated here (reads): “July 25, 1916,” addressed to the Union Oil Company of California, Seattle, Wash., “Gentlemen: In the past week we have had the following orders,” and that’s enumerated as one of them—The Tenakee Fisheries Company.

Q. Yes, but you have testified right along in this case, when Mr. Faulkner would ask you about orders, you said you had orders, right straight along, for a whole lot of matters, but you meant verbal orders, didn’t you? A. No.

Q. When you used the word “order” at any time during your testimony here, had you meant that you had written orders? A. Yes, sir.

Q. At all times?

A. No; part of them are verbal.

(Testimony of J. C. McBride.)

Q. Well, didn't you, when Mr. Faulkner was asking you questions, didn't you in reply state—didn't Mr. Faulkner state to you. Now did you have orders from so and so and you went over this bill of particulars and said, yes, you had orders when you didn't mean anything but these verbal orders? A. I had orders for them. [253]

Q. For all of them? A. Yes, sir.

Q. For all the items as set forth in this bill of particulars, you had orders? A. Yes, sir.

Q. The bill of particulars that you have filed in this case? A. Yes, sir.

Q. Had written orders for them? A. No, sir.

Q. Well, I don't catch you yet. You don't distinguish, then, between the term written and verbal orders. You make no distinction between them?

A. I have explained to you, as I have gone through there about what contracts I had with these different gentlemen.

Q. Yes, but now when Mr. Faulkner asked you, if my memory serves me right, and I think it is true that you went over your bill of particulars, and he asked you if you had any orders for this and that and the other thing and so forth and so on, enumerated the items in this bill of particulars, and in each instance, you said that you had orders for them? A. Yes, sir.

Q. Now, do you want to convey the impression to the Court and jury that you had written orders every time that that question was put to you on each item?

(Testimony of J. C. McBride.)

A. I was asked the question if I had orders, and I said yes.

Q. What do you mean?

A. I said I had those orders.

Q. What do you mean by orders. Do you mean written, verbal or in pen? What do you mean by that? [254]

A. Well, you asked me the question if I had an order, and I said yes. Why don't you ask me what kind—

The COURT.—Well, now here. There is no use arguing over the question. You can make your question so that you can get the proper answer from the witness.

Q. Well, now, Jack, how many written orders and how many verbal orders did you have for these particular items, as set forth in your bill of particulars?

A. Just as I have stated there to every one of those questions, that all those first have been verbal orders and the latter part of them was orders that I had found in going through my files here and there, one or two of them.

Q. But in your testimony you did use the word "order" to mean interchangeable, either written order or verbal order? A. Yes.

Q. That's all I want to know.

A. I'm not trying to make you believe—I'm not trying to avoid the question in any way or trying to fool you at all.

Q. Is there anything on that letter concerning

(Testimony of J. C. McBride.)

lubricating oil for this last, Pillar Bay— No, that's the Tenakee Fisheries? A. No.

Q. Let's see. Pillar Bay, Tenakee and Northwestern Fisheries Company. You state there that you had orders from each one of those companies; but there is nothing said there whether or not you had written or verbal orders, in that letter, is there, Jack? A. Shall I read it?

The COURT.—Well, he asked you—you can read it to yourself. [255]

A. It don't state in this letter whether they were written or verbal.

Q. Do you have any remembrance of it one way or the other?

A. It may be that these were orders that I received by letter.

Q. You can't find any such letter?

A. No; I can't.

Q. You remember those in particular, though, being letters. Now, that includes the items on your bill of particulars here, Jack, so as to get at that matter quick. It includes the items of Pillar Bay Packing Company, Tenakee Fisheries and Northwestern Fisheries, don't it? Look and see so we can get through with it. A. Yes.

Q. There isn't anything said in your letter to the Union Oil Company, which is Defendant's Exhibit "Q" in this case, about anything except so much distillate? There is nothing said about lubricating oil, is there? A. No, sir.

Q. But it does state, in each one of these cases, in your bill of particulars, that the Pillar Bay Com-

(Testimony of J. C. McBride.)

pany was to have—no, that the Tenakee Fisheries was to have 1650 gallons, and the other two companies how much lubricating oil? I just hand you that to refresh your memory.

A. Pillar Bay 1650 and Tenakee 3300.

Q. That is refined oil? A. Refined oil.

Q. How much lubricating?

A. 821½ gallons and 165.

Q. Nothing said in your letter to the Union Oil Company about lubricating oils, is there? [256]

A. No, sir.

Q. Astoria & Puget Sound Canning Company. You have that, Jack, listed here for the years 1915 and 1916, 30,000 gallons of refined oil and 15,000 for each one of those years, 1915 and 1916, 1500 gallons of lubricating oil. Bob Bell was at the head of that cannery, wasn't he? A. Yes, sir.

Q. Where was Bob Bell when you had this agreement with him? A. In Juneau.

Q. What was the nature of the conversation you had with him?

A. I asked him if I could supply him with oil.

Q. And he told you if you had the oil, you could supply him? A. Yes, sir.

Q. That was for the two years, 1915 and 1916?

A. Just what it states?

Q. That's all you have here? A. Yes.

Q. When was the talk you had with him in 1915, do you remember what month? A. No; I don't.

Q. What place?

A. I think that was in Seattle.

(Testimony of J. C. McBride.)

Q. That was what he estimated it would take to run his cannery during those two years?

A. Yes, sir.

Q. George Naud. He's a private individual?

A. Yes, sir.

Q. Was he ordering anything from you as a Government official, or ordering privately?

A. No; just buying fish down at Taku. [257]

Q. He wasn't in a Government position then?

A. No, sir.

Q. Where did you have this conversation with George Naud? A. In the office.

Q. What boat was he running?

A. I don't recall the boat.

Q. Do you remember what year?

A. Nineteen hundred—

Q. Without looking at the bill of particulars?

A. How is that?

Q. Do you remember what year you were to furnish him anything without looking at the bill of particulars? A. No; I don't.

Q. And you don't remember the gallons without looking at the bill of particulars? A. No.

Q. Now, the only order you had with him was this verbal conversation you had with him that he was to take this much oil, is it? A. Yes, sir.

Q. During that year? A. Yes, sir.

Q. Just what year— You got it here?

A. Yes, sir.

Q. 1916; that's all you got here. Oh, it's 1917 instead of 1916. It's my mistake. Now, then, there is another one. Valdez Packing Company,

(Testimony of J. C. McBride.)

19,120 gallons. You remember what year that was in?

A. I don't recall right now. I had orders for those.

Q. Have you offered them in evidence here?

[258] A. No, sir; I have misplaced them.

Q. Misplaced those. Where was the Valdez Packing Company doing business? A. Valdez.

Q. How far is that from Juneau?

A. Oh, 800 or a thousand miles.

Q. You say you had a written order for that and it was lost? A. Yes.

Q. You know by whom it was signed?

A. No; I don't.

Q. You remember what time approximately you received, the C. W. Young Company received it through you? A. No; I don't.

Q. What year?

A. No; I don't just remember the year.

The COURT.—Was there some correspondence with the main company about it?

The WITNESS.—There was about some other oil that they wanted.

The COURT.—Oh, some other oil.

The WITNESS.—Yes.

Q. Well, had the Valdez Packing Company—How do you fix the time that you received any order from them, Jack, did you have anything in your book? A. How is that?

Q. Did you have any entry in the books of the C. W. Young Company or any memorandum?

(Testimony of J. C. McBride.)

A. I had that order when I made up my bill of particulars.

Q. Oh, when you made up this? [259]

A. Yes, sir.

Q. In January, 1922? A. Yes, sir.

Q. What has become of it? A. I don't know.

Q. Who was present when you had the order?

A. Earl and I.

Q. Was all of this to be delivered at one time— 19,320 gallons of refined oil and 966 gallons of lubricating oil?

A. Yes, sir. I have forgotten how many drums; 180-odd drums, as I recall. It will tell you there.

Q. All to be delivered at once? A. Yes, sir.

Q. Icy Straits Packing Company. Who was at the head of that concern? A. Dick Wulzen.

Q. Wulzen. Where was that located?

A. Idaho Inlet.

Q. That was running during the year of— What year was it that you were to furnish oil to them?

A. 1917.

Q. Was that an oral conversation? A. Yes, sir.

Q. With Dick Wulzen himself? A. Yes, sir.

Q. Is that the cannery that Maloney and Hanley were interested in? A. No, sir.

Q. Was it running in 1917, Jack, when you gave— [260]

A. They had— They didn't have a cannery. They had, I understand, six traps that they were running and driving. They had a pile-driver and a couple of boats.

(Testimony of J. C. McBride.)

Q. Who was associated with Wulzen in that, do you know? A. It was Thane.

Q. Bart Thane? A. Yes.

Q. Was that a cash order or a time order, do you remember? A. I don't remember.

Q. Just a verbal conversation? A. Yes, sir.

Q. You and Dick Wulzen are good friends and you just had a conversation?

A. Yes, sir; personal friends.

Q. He said he would need that much oil during that season? A. Yes, sir.

Q. Now, then, you have there, I think it is 30,000, if I read it all, of refined oil and 1500 of lubricating oil. How many gallons are there in a barrel of lubricating oil, do you know?

A. Of lubricating? Q. Yes, sir.

A. Fifty—about fifty gallons that is, in a regular barrel.

Q. And this refined oil was in drums, wasn't it?

A. Yes, sir.

Q. Cannery drums; that is it came in drums?

A. Yes, sir.

Q. Came in drums that was furnished by the Union Oil Company? A. Yes, sir.

Q. This Valdez Packing Company order, which is 19,320 gallons, you say is one order. That is a pretty good-sized order, [261] wasn't it, for oil?

A. Oh, no; not particularly so where they were out.

Q. Large order?

A. Not for out where they were. ¹⁰³.

